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MISTAKE IN THE CONSTRUCTION OF CONTRACTS

THE need for careful use of words in discussing mistake in the law of contract is so obvious that we feel it necessary, in inflicting on the readers of this *Review* yet another article on the topic, to provide ourselves (and them) with a short glossary showing the meanings we attach to some of the terms about to be used. We realise that these definitions are too compressed to be entirely satisfactory but nevertheless feel that in a general discussion they are a help to the achievement of greater precision.

Common mistake. An error common to both parties as to some fundamental fact in a case where, the rules of offer and acceptance being satisfied, a contract is otherwise achieved.

Mistake as to subject-matter. An error by one or both parties as to some fundamental fact in a case where, the rules of offer and acceptance being satisfied, a contract is otherwise achieved.

Literal contract. The terms of a contract as expressed by the parties.

Total contract. The terms of a contract as expressed by the parties plus the additional terms (if any) which the law holds to be included and less any terms used by the parties which the law holds to be excluded.

Implied term. A term of the total contract not expressed by the parties.

Inoperative obligation. An obligation under a literal contract which, on the true interpretation of the total contract, is not required to be carried out.

More will be said about these definitions in the following discussion. Meanwhile we would say that our main object is to add our

voice to those that have been raised [1] to urge that mistake should no longer be treated by textbook writers as a separate category of the law of contract, and to explore some of the consequences of dealing with mistake as to subject-matter by arriving at and then applying the total contract. We treat the total contract as including implied terms whether these are taken to be included by reference to the presumed intention of the parties or by the operation of a rule of law.[2] We refer to mistake as to subject-matter rather than common mistake because we believe the latter term to be unsatisfactory in stressing a factor which may well be irrelevant, since the parties have *ex hypothesi* reached agreement and complied with the rules of offer and acceptance. In these circumstances, where the court has the task of arriving at and then applying so much of the total contract as applies to the matters in dispute, its approach is the same whether both parties were mistaken or only one. This is illustrated by *Harrison & Jones* v. *Bunten & Lancaster* [3]—a case to which we will return later—where the contract concerned a sale by description of Calcutta kapok, " Sree " brand, both parties believing it to be free from cotton when it was not. Pilcher J. said [4]:

> " *Ryder* v. *Woodley* seems to show that in this type of case a mistaken belief by the buyer as to the nature and quality of the goods bought by description is immaterial, provided that goods which answered the description were delivered. It is not easy in principle to see why the fact that the sellers also shared the mistaken belief should be material."

The learned judge went on to say firmly [5] that, where the buyer was mistaken in a case of this kind, he could see no reason " why the fact that the seller may entertain the same unexpressed but erroneous belief should have any relevance when the rights of the parties come to be considered." This applies also where the contract relates to a specific object, for example, the new oats in *Smith* v. *Hughes*.[6] If, from an objective standpoint, the buyer did not misunderstand the offer and if the seller did not have actual knowledge of a subjective misunderstanding of the offer by the buyer (in either of which cases the mistake would fall within the realm of offer and acceptance [7]) the question of whether the buyer's mistaken belief that the oats were old was or was not shared by the seller would

[1] *e.g.*, C. J. Slade, " The Myth of Mistake in the English law of Contract " (1954) 70 L.Q.R. 385. Mr. Slade's words seem to have fallen on deaf ears: the new editions of the two leading textbooks, Cheshire & Fifoot and Anson, each have a separate chapter on mistake. *Cf.* Atiyah, *An Introduction to the Law of Contract* (Oxford, 1961).

[2] For a discussion of the principles which guide the courts in arriving at the total contract in commercial cases not affected by mistake, see Fridman (1960) 76 L.Q.R. 521.

[3] [1953] 1 Q.B. 646.

[4] At p. 655.

[5] At p. 660.

[6] (1871) L.R. 6 Q.B. 597.

[7] On the understanding that we treat the requirement of certainty as part of the rules of offer and acceptance. On this see below.

be immaterial. If one believes that a fundamental mistake as to subject-matter vitiates a contract, one will of course insist that the mistake must be common. But if, with Lord Atkin and the majority, one believes that the question is one of construction, it is plain that the total contract must deal with the case where only one party is mistaken as well as with the case where both are. This is not to deny that the total contract may in some cases be held to differ according to whether the mistake is common or not, but merely to insist that the construction theory must find room for both types of mistake. It is a plain fallacy to say that because an implied term bearing on mistaken facts can only be read into a contract if (however notionally) it was agreed to by both parties, therefore there can be no implied term unless the parties agreed in their view of the facts.

It seems to us conclusively established [8] that what Dr. Cheshire and Mr. Fifoot refer to as mutual mistake and unilateral mistake [9] relate to offer and acceptance and we do not wish to discuss them further here. Mistake as to subject-matter, except in certain hypothetical cases where it may be said also to fall within the sphere of offer and acceptance,[10] should in our view be treated as one of many factors that may need to be considered in arriving at the total contract. It belongs, in other words, to a discussion on the construction of contracts and the circumstances in which terms will be taken to be implied, as the courts have almost invariably held. The starting point is always the literal contract and not the mistake. The question is not what are the parties to be taken to have intended to happen if one or both of them were mistaken, but what are they to be taken to have intended to happen *on the facts as they actually were*.

We should perhaps make it clear at this stage that when we say that cases of mistake as to subject-matter should be treated as belonging to a discussion on the construction of contracts, we do not wish to commit ourselves (at any rate in this article) on the scope of the legal concept of " construction." We believe that a close examination of this concept would reveal problems analogous to those which underlie the controversy as to the basis of the doctrine of frustration, but to embark on this task now would take us too far afield. In any event we are satisfied that the validity of the views put forward in this article is unaffected by whichever theory of construction is adopted.[11]

[8] As by C. J. Slade, *loc. cit.*; *cf.* T. H. Tylor, 11 M.L.R. 262.

[9] " Unilateral " mistake is apparently given the artificially limited meaning of mistake by the offeree as to what the terms of the offer are, the mistake being known to the offeror: Cheshire & Fifoot, 5th ed., p. 175; *cf. ibid.* p. 193.

[10] See below.

[11] In view of the possibility of some remarks in my *Introduction to the Law of Contract* being misunderstood, it is proper for me to add this footnote for which I alone am responsible. I adhere to the views I expressed in (1957) 73 L.Q.R. 340 subject to the same caveat as expressed in the text above, though I regret to say there are some remarks which might have been better stated. On the

This leads to another point. It may be said in objection to the treatment of mistake as depending on construction, that this theory would destroy all certainty in this field since a decision on the construction of one contract could not be used as a precedent in dealing with another contract. Apart from the fact that the law on this subject could hardly be in a greater state of uncertainty than it already is, we suggest that this objection is, in any event, groundless. A decision by a court as to what was in the mind of a particular person at a particular moment, or as to the meaning of certain words in a particular context, would of course be useless as a precedent in a later case. But the construction of contracts certainly goes beyond this. At least it extends to deciding what reasonable men would have intended had they been in the position of the parties, and this may well be a valuable guide to another court in dealing with parties similarly placed.

We have said above that there may be circumstances in which mistake as to subject-matter should properly be treated as falling within the sphere of offer and acceptance. This is because it is possible to envisage cases where even the total contract does not indicate any solution to the problem which has arisen. If in *Couturier* v. *Hastie*,[12] for example, the parties had exchanged correspondence before the contract was concluded, in which the possibility of the cargo having been sold due to overheating had been discussed, and if the parties had disagreed about what was to happen in such a case, but, hoping that their fears were illusory, had ended by saying nothing about it in the literal contract, the court might have found it difficult to discover any term which could properly be taken to be implied. The solution here, it is submitted, lies in the realm of offer and acceptance. Treating the terms of the total contract as embodied in the offer it would be evident that the offer was uncertain as to a point that, on the facts as they actually were, was of vital importance. Under the general principle that an offer must be certain before its acceptance can lead to a contract,[13] no contract would therefore have come into existence. While we believe, therefore, that the legal analysis of mistake as to subject-matter must find room for cases where the contract is void for uncertainty, it is evident that such cases will be rare. Normally the courts have no difficulty in reaching a solution by arriving at and then applying the total contract.

It follows from what we have been saying that there is no more

other hand, as is plain from my *Introduction*, I do not accept the narrow traditional view of the function of "construction" and it was owing to my belief that my article in (1957) 73 L.Q.R. 340 might be interpreted to support this view, that I inserted a word of caution about it in my book at p. 130.—P.S.A.

12 (1856) 5 H.L.C. 673.

13 As illustrated in *Falck* v. *Williams* [1900] A.C. 176, *Scammell* v. *Ouston* [1941] A.C. 251 and many other cases. The American Restatement on Contract expresses it thus: "32. An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performance to be rendered by each party are reasonably certain."

reason to treat mistake as it affects the contract itself in a separate category than there is to treat mistake inducing an innocent misrepresentation [14] separately from the law relating to innocent misrepresentation, or mistake as to the existence of an illegal element [15] separately from the rules concerning the effect of illegality. This argument of course involves the rejection of the view that common mistake on a matter going to the root of the contract can of itself render the contract void. Since this theory is apparently still held in some quarters [16] we should say something about it. We do not wish to recapitulate all the well-known arguments against this theory [17] but will confine ourselves to those points which are particularly relevant to the general thesis of this article.

The principal weakness from which, it seems to us, the mistake theory suffers is that it involves concentrating on one aspect of a factual situation to the exclusion of many other relevant aspects of the same situation. The facts may, for instance, raise what appears to be a plain case of fundamental mistake as to subject-matter but it would be manifestly wrong to conclude, without further inquiry into the circumstances, that the obligations of the parties must be inoperative. Despite the existence of the mistake there may well be—in most cases, we venture to suggest, almost certainly will be—other factors such as express or implied terms or misrepresentation, which plainly show that the obligations of the parties are *not* inoperative. Alternatively, the facts may raise questions of illegality, in which case the obligations of the parties may indeed be inoperative but there may well be other, more drastic, consequences.

To take the first possibility, it is plain that, while there may be a mistake as to subject-matter in a contract for, say, the sale of goods, the seller by giving an express warranty as to the facts about which the parties are mistaken, may have assumed the risk of the facts being other than they are believed to be. Now it surely cannot be the law that despite the presence of an express warranty it remains open to the seller to allege that the contract is " void " for mistake as to one of the matters covered by the warranty. Yet a mistake may be nonetheless genuine for the existence of a warranty and if the mistake is operative, logically the whole contract should be void, including the warranty, for it is difficult to see how a term in a contract can prevent the contract being void. The answer to this difficulty on the mistake theory would presumably be that if one of the parties had expressly agreed to bear the risk of the goods

[14] As in *Oscar Chess* v. *Williams* [1957] 1 W.L.R. 370, see below.

[15] As in *Shaw* v. *Shaw* [1954] 2 Q.B. 429, see below.

[16] See *e.g.*, Anson 21st ed., p. 251, and Devlin, L.J. in *Ingram* v. *Little* [1960] 3 All E.R. 332.

[17] Of which probably the best expression is in the judgments of the High Court of Australia in *McRae* v. *Commonwealth Disposals Commission* (1951) 84 C.L.R. 377.

being defective, then the absence of the defect could not be said to be the fundamental assumption or basis on which the parties had contracted. This, however, seems to be merely an unconvincing way of arriving at the result that a contract is only " void " for common mistake if, on the true construction of the contract, the parties intended that their obligations should be inoperative in the event of the facts as assumed being untrue. Naturally this construction is untenable where there is an expressed intention that one of the parties should bear the risk of the facts as assumed being untrue.

What we have been saying so far is borne out when it is recalled that the grounds on which it is usually urged that a contract may be void for a mistake of this kind are that the parties have contracted on a certain " basis " or " fundamental assumption " as to some essential fact which has proved unfounded. This kind of language slurs over the possibility that one or other of the parties may have accepted the risk that the facts as assumed would prove untrue. It thus becomes all too easy to fall into the error of saying that *because* the parties have contracted on a certain basis, *therefore* the contract is void if that basis does not exist. This is in fact a palpable *non sequitur* because it may well be—indeed it usually is—the responsibility of one or other of the parties to see that that basis does exist. For example, it could truly be said that in a contract of sale of goods it is a fundamental basis of the contract that the seller has a right to sell the goods, but the absence of this basis does not render the contract void, or the obligations inoperative.

These arguments are equally applicable where the facts raise a case of mistake as to subject-matter which overlaps with a misrepresentation. Indeed, every case of effective misrepresentation necessarily involves mistake on the part of the person to whom the representation is made, since it is only if he does not know that the representation is false that he is able to rely on it as grounding a legal remedy; and where the misrepresentation is innocent the mistake must also be shared by the other party. Yet it is plain that where the misrepresentation is effective no court would ignore that aspect of the case and hold the contract void as a result of the mistake.[18] We do not see how this can be explained except by saying that a mistake as to subject-matter is merely part of the total situation which a court must examine before it can decide whether the risk of the facts as assumed being untrue, is on one or other of the parties or on neither.

[18] Although this course was in effect advocated in the 4th ed. of Cheshire & Fifoot (p. 246) the learned authors appear to have thought better of it because this suggestion is not to be found in the 5th ed. The same fallacy is, with respect, one of the unsatisfactory features of the judgment of Denning L.J. in *Solle* v. *Butcher* [1950] 1 K.B. 671, since he decided the case on the mistake point without expressing a concluded opinion on whether there had been a misrepresentation as alleged by the defendant. We refer to this case again below.

We would add a further point to these criticisms of the traditional theory of mistake as to subject-matter. Not only is this theory difficult to reconcile with cases where express or implied terms, or misrepresentations, overlap with the mistake, but it also appears to involve an incorrect statement of the principle prima facie applicable. We suggest that even where the facts do involve a mistake as to subject-matter the general presumption is that the literal contract is to be carried out, and if it cannot be carried out the party in default will be liable to pay damages. Even if there is no express intention placing the risk of the facts as assumed being untrue on one of the parties, the court is usually able to find an implied term which does so. To hold the obligations of the parties to be inoperative is usually a last resort, a residual possibility which only comes in when all attempts by the court to allocate the risk have failed.[19]

There is a further point on which we would join issue with the proponents of the mistake theory, namely, the suggestion that even where a mistake of this kind is effective, it renders the contract "void." This, we believe, is inaccurate, since *ex hypothesi* the parties have agreed, even if the agreement is only to be carried out in the event of a certain "fundamental assumption" being correct. If the agreement cannot be carried out and neither party has accepted the risk of this state of affairs, the natural solution is to say that the obligations of the parties are inoperative, rather than that the contract is void. Moreover, if we are right in our view that mistake of this kind only operates where an express or implied term places the risk on neither party, it follows that it would be incorrect to treat the contract as void in such circumstances. The circularity of saying that a contract is void, that is to say totally ineffective, because of the effect of one of its terms, is obvious. We therefore prefer to say that in such a case the obligation dealt with by such a term is, on the true interpretation of the total contract, an inoperative obligation. Thus if on the facts in *Coutourier* v. *Hastie* [20] the argument that there was an implied condition precedent that the goods were in existence at the time the contract was made,[21] is accepted, the true analysis of the case is that the effect of the total contract, on the facts as they actually were, was to render inoperative the seller's obligation to deliver the goods and the buyer's obligation to accept them and pay the price.

It should not necessarily be assumed that the distinction between holding the contract to be void and holding the obligations of the parties to be inoperative is merely a question of terminology and has no practical importance. For one thing, the argument that at common law operative mistake as to subject-matter causes a

19 There may, of course, be statutory reversals of this presumption, as in s. 6 of the Sale of Goods Act, 1893.
20 (1856) 5 H.L.C. 673.
21 See Atiyah (1957) 73 L.Q.R. 340.

contract to be void has recently been used to support the suggestion that there is an independent doctrine of mistake in equity [22] an argument that may lose some of its force if it is admitted that in such cases the contract is not void. For another thing if there are several distinct obligations in the contract and the mistake only affects some of them, the legal efficacy of the other obligations will depend on whether the mistake is to be treated as rendering the whole contract void or merely as rendering certain obligations inoperative.

Mistake as to Nature or Quality in Sale of Goods

The field of sale of goods, with its closely worked out implied terms, is a useful one to explore with a view to demonstrating the irrelevance of concentrating on mistake as to subject-matter rather than on the rights and obligations of the parties on the facts as they actually are. As one of us has previously discussed from this point of view mistake as to the existence of the subject-matter,[23] we turn now to mistake as to the nature or quality of the goods being sold.

Approaching a contract of sale of goods from any point of view it cannot surely be denied that there are three and only three basic possible ways in which the law could deal with such a mistake. First, the law may hold that the responsibility is on the seller. Whether this would give the buyer a right of rejection or merely a right to claim damages can be left aside for the moment. Secondly, the law may hold that the responsibility is on the buyer, although in this case risk would be the more appropriate word. In this event there are surely no alternatives, for if the risk is on the buyer he clearly must take the goods and pay the price. Thirdly, the law may hold that the responsibility is not on the seller nor is the risk on the buyer. In this event the obligations would be inoperative, the seller would not be liable in damages, and the buyer would not be bound to take the goods or pay the price. What is apt to be misleading about this third case is that, if it arose, it would not be as impartial as it might seem when set against the other two possibilities. This is because to render the obligations inoperative would be to benefit the party against whom the contract was sought to be enforced. Thus if the buyer is suing the seller for damages in respect of the defect in the goods, the seller might find it advantageous to establish that his obligation is inoperative and to return the price in exchange for the buyer restoring the goods. This could happen if, for example, the market price of the goods has risen after the contract was made, or if there were a claim for consequential damages as a result of the defect. On the other hand, and far more frequently in practice, the buyer may be wishing to have his obligations declared inoperative because he desires to reject the goods, while the seller is seeking to enforce the contract. In

[22] By Denning L.J. in *Solle* v. *Butcher* [1950] 1 K.B. at p. 694.
[23] Atiyah, (1957) 73 L.Q.R. 340.

this event it may serve the buyer's purpose equally well either to prove that the seller has been guilty of a breach of condition which entitles him to reject the goods, or to prove that his obligation is inoperative. In fact it will often be more advantageous to the buyer to establish that the obligation is inoperative because by doing so, although he will lose any right to damages, he will be able to evade the strict limitations on the right of rejection imposed by the Sale of Goods Act.[24] This, of course, would be a paradoxical situation because it would mean that a seller who had been guilty of a breach of contract might be better placed than a seller whose obligation was inoperative.

It may be objected to our theory that since the holding of the obligations to be inoperative is in practice likely to benefit one party more than the other, the law is in some sense still holding the risk to be on one of the parties. The answer to this difficulty, it is submitted, is that the law is not concerned about factors *dehors* the contract which may render a finding that an obligation is inoperative more to the advantage of one party than the other. Outside events (*e.g.*, a rise or fall in market prices) may render the performance of a contract more to the advantage of one party than the other and it is not surprising that the same may be true of a finding that the obligation is inoperative. Either way the law is indifferent: it applies the total contract.

The three possible solutions to the problem of risk may now be examined in more detail. First, then, as we have said, the law may hold that the responsibility for the defect in the goods is on the seller. This may be because he has expressly stated the goods to be without the defect. In this event, whether the statement is innocent or fraudulent, and whether it is a term of the contract or a mere representation, the responsibility lies on the seller. It is true, of course, that if the statement is a mere innocent misrepresentation the buyer has no claim for damages against the seller, but the right of rescission, being a right at the buyer's option only, is some justification for regarding the responsibility for the defect as the seller's. It is also true that if the goods have been resold or a certain period has elapsed the responsibility will have ceased owing to the limitations on the remedy of rescission. But other legal remedies also have their limitations, and may be terminated by events subsequent to the breach. It is the state of the rights and duties of the parties at the time when the contract is made which determines where the risk lies.

If the seller has not expressly made himself responsible for the

[24] It has recently been held by the C.A. that the restrictions on the right of rejection laid down by the Sale of Goods Act are equally applicable to the right of rescission for innocent misrepresentation (*Long* v. *Lloyd* [1958] 1 W.L.R. 753) but it has never been suggested that they can also apply where the obligations are inoperative or, as it is usually put, where the contract is totally void. This no doubt is one of the principal reasons why a buyer may seek to persuade the court that his contract is void.

defect he may still be held liable under the terms implied by the Sale of Goods Act. Moreover, even if the seller has made a mere representation as to the quality of the goods, this would not exclude an implied term covering the same ground, thus giving the buyer more extensive remedies than those afforded for an innocent misrepresentation.

It is commonly stated that a seller is under no duty to disclose defects in the goods to the buyer, or, putting it the other way, that silence is not a representation.[25] This, however, is a somewhat misleading proposition, and it is surprising that it is still generally accepted as an axiom of the law. For what, after all, is an implied term if it is not an implied promise either that something shall happen, or that a state of facts exists? But an implied promise that a state of facts exists is surely nothing else than an implied representation. It is not, indeed, the equivalent of a mere misrepresentation because that is not a term of the contract, and if innocent, gives the limited remedy of rescission. An implied term, however, has exactly the same effect as an express term, which is of course far more favourable to the buyer than a mere representation.[26]

Thus to say baldly that there is no duty on a seller of goods to disclose defects in them is to ignore the frequent existence of implied terms under sections 12–15 of the Sale of Goods Act which impose a far heavier responsibility than would be imposed by a duty of disclosure. Quite apart from the difference in remedies, a duty of disclosure would only extend to facts known to the person under the duty, whereas the implied terms under the Sale of Goods Act extend to latent defects, even if not known and even if they could not have been discovered by the use of due care and diligence.[27] The only real significance of the so-called rule that silence is not a representation is that the mere knowledge of the seller that there is a defect in the goods is, by itself, no ground for implying a term in respect of that defect. Even this rule may not be absolute. If a defect has been caused between the inspection of the goods by the buyer and the making of the contract the court may well be reluctant to hold that the seller is absolved from responsibility. In *Karsales (Harrow) Ltd.* v. *Wallis* [28] W. was offered a secondhand Buick car, which was in excellent condition when he inspected it. Some weeks passed before W. entered into a hire-purchase agreement in respect of the car, and when it was delivered (by towing as it would no longer go) it was in a deplorable state. The new tyres had been changed for old ones, the engine was badly damaged, the

[25] See *e.g.*, Cockburn C.J. in *Smith* v. *Hughes* (1871) L.R. 6 Q.B. 597 at 605; Cheshire & Fifoot 5th ed., p. 216; Anson 21st ed., p. 212.

[26] It may be noted in passing that the familiar distinction between an express term of a contract and a misrepresentation corresponds exactly with the less familiar distinction between an implied term of the contract and a breach of duty of disclosure.

[27] See *e.g.*, *Frost* v. *Aylesbury Dairy Co.* [1905] 1 K.B. 60.

[28] [1956] 1 W.L.R. 936.

radio was missing and there were other defects. Nothwithstanding rigorous terms in the agreement excluding liability for defects, Denning L.J. held that where inspection had taken place in such circumstances there was an obligation to deliver the goods in substantially the same condition as when they were seen and that it was an implied term of the agreement that pending delivery the car would be kept in suitable order and repair.[29] The value of this decision in relation to sale of goods is reduced by the fact that it arose on a hire-purchase case, to which the Sale of Goods Act does not apply. (The wide interpretation placed in this case by the Court of Appeal in *Yeoman Credit, Ltd.* v. *Apps*[29a] is not relevant to the question discussed here.)

Before examining cases of mistake as to quality in which the position is complicated by the provisions of the Sale of Goods Act, it is worth considering the possibility of a mistake as to the nature of the goods. The following example of a contract said to be void for mistake which is given in Anson [30] may be taken as a starting point:

> " Suppose that A agrees to buy and B agrees to sell certain bales which both parties believe to contain hemp; they in fact contain tow."

Now it must be said at the outset that it is most improbable that such facts could occur without the seller stating either orally or in writing (*e.g.*, in a catalogue at an auction sale) that the bales contain hemp, and in this event there can surely be no question of the contract being void for mistake. The seller will be liable to the buyer for breach of the condition that the goods should correspond to their description [31] or the contract will be liable to be set aside for misrepresentation. If, on the other hand, the bales have been sold without the word " hemp " being used the most natural interpretation of the parties' conduct would be that the buyer had agreed to buy the bales, whatever they might contain, *i.e.*, it would be a classic case of *caveat emptor*. It may be true that the third possibility—that the risk of the bales containing tow is on neither party—cannot be entirely ruled out. For example, if at an auction sale S bought some bales which were stated to contain hemp although in fact they contained tow, and immediately after the goods had been knocked down to him, B were to offer to buy " those bales which you have just bought " it is possible that an acceptance by S would result in an inoperative contract. But this would be so not just because the parties had made a fundamental mistake but because it would be difficult in such circumstances for the court to

[29] At p. 940.
[29a] [1961] 2 All E.R. 281.
[30] At p. 251.
[31] Even an exemption clause would not protect the seller because this would plainly be a fundamental breach.

imply a term that either party accepted the risk of the bales containing something other than hemp. The seller could hardly be taken to be warranting the nature of the contents of the bales when he had had no chance of examining them, and the buyer could not be assumed to be buying whatever the bales might contain when he had just heard the bales described as containing hemp. It need hardly be stressed that this is a most improbable case, and that normally the court would have no difficulty in holding that the total contract placed the risk on one or other of the parties.

The position under the Sale of Goods Act is complicated by the opening lines of section 14, which preserve the rule of *caveat emptor* subject to the exceptions there referred to:

> " Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows . . . "

If these words mean anything they surely mean that there are no implications of any kind as to quality or fitness except those expressly laid down in the Act or some other statute. Generally speaking this accords with the view that we have put forward to the effect that in the vast majority of cases the risk of a mistake as to quality is on one party or the other. Either the seller is liable for breach of an express or implied term, or for misrepresentation, or it is a case of *caveat emptor*. But the effect of section 14 appears to be to exclude altogether the third possibility, namely, that the risk is on neither party and the obligations are inoperative. It is possible to imagine circumstances in which this could lead to difficulty. Suppose, for example, the following facts: B calls at S's antique shop and inspects a porcelain figure which he finds to be flawless. He leaves, saying " he will think it over," and shortly afterwards a careless assistant drops the figure which suffers unobtrusive cracks sufficient to make it almost worthless. B returns the same day, and mistakenly believing the figure to be as it was when he inspected it, buys it without further examination at the price originally asked. If S is ignorant of what has happened it is submitted that *caveat emptor* applies and the risk is on B. On the other hand if S knows of the defect this would obviously be an unfair result, yet it is difficult at first sight to see how it could be avoided consistently with section 14 of the Sale of Goods Act. It may be possible, however, to infer an implied condition in such circumstances to the effect that the seller does not know of any change in the condition of the goods since they were inspected. *Karsales, Ltd.* v. *Wallis*, to which we have referred above, may possibly lend some help to this conclusion.

The significance of the principle embodied in section 14 of the Sale of Goods Act thus becomes apparent. If the first of the possibilities referred to above does not operate, the law adopts the second

and discards the third. In the particular case of mistake as to quality—as opposed to mistake as to the existence of the goods, or mistake as to the nature of the goods, or (perhaps) mistake as to a change in the circumstances between the date of examination and the date of the contract—the irresistible inference to be drawn from the Sale of Goods Act appears to be that the risk of all defects is on the buyer, unless the seller has expressly assumed the risk, by a term of the contract or a representation, or unless there is an implied condition or warranty under sections 12–15 of the Act or under some other statute. An examination of some recent cases from this point of view may be useful.

In *Nicholson & Venn* v. *Smith Marriott* [32] the plaintiffs agreed to buy some antique linen from the defendants. The linen was expressly stated to be Caroline, but in fact it turned out to be Georgian. The buyers claimed either that the contract was void for mistake, or alternatively that the sellers had been guilty of a breach of condition and that the buyers were entitled to damages. At the trial the buyers did not press their claim on mistake and they were awarded damages for breach of condition. The learned judge, Hallett J., however, went on to give his opinion on the mistake point and, basing himself on Lord Atkin's judgment in *Bell* v. *Lever Bros.*,[33] he said that he thought the contract was void. It would hardly be worth citing this case merely to suggest that this dictum was wrong, because this seems generally agreed. The really interesting thing about the case is that it demonstrates the danger, in sale of goods cases, of keeping the law of mistake separate from the law of express and implied terms. If this contract was really void then the sellers could have pleaded its voidness just as much as the buyers, in which case they would not have been liable to pay damages for breach of condition, although no doubt they would have had to return the price, which usually comes to the same thing. But to hold it void, or, as we prefer to say, to hold the obligation inoperative, would have been to ignore the fact that by expressly warranting the linen to be Caroline the sellers had taken the risk of the linen turning out to be other than Caroline. The proper analysis of this case, it is submitted, is as follows: The obligation could not be held inoperative unless it was clear that the intention of the parties was that neither of them accepted the risk of the linen not being Caroline, as would have been the case, for example, if the sellers had in effect said, " We do not warrant that this linen is Caroline, but on the other hand, if it is not, we will take it back and return your money." This construction of the contract was, however, entirely negatived by the express statement of the sellers that the linen was Caroline. This case differs from a number of others in that the buyers' attempt to have the contract declared

[32] (1947) 177 L.T. 189.
[33] [1932] A.C. 161.

void was (presumably) not inspired by a wish to extend the implied terms in the Sale of Goods Act, but to evade the inconvenient restrictions on the buyers' right of rejection. It also differs from cases such as *Oscar Chess* v. *Williams* [34] in that the description of the linen as Caroline was a condition and not a mere representation. In the latter case both parties, acting on information contained in a car log book (which proved to have been forged), were under the belief that a car made in 1939 was a 1948 model. This inflated the market price from £170 to £285. Although the car was described in the contract as a " 1948 Morris " a divided Court of Appeal held that this was not a term of the contract but a mere misrepresentation. The buyer having already disposed of the car was not in a position to ask for rescission of the contract, but this does not alter the fact that at the time when the contract was made the risk of the car not being a " 1948 Morris " was, as a result of the legal rules relating to misrepresentation, on the seller.

A recent case where the risk was held to be on the buyer was *Harrison & Jones* v. *Bunten & Lancaster*,[35] the facts of which have already been given. It was clear that the sellers had never stated that the brand of kapok in question contained no cotton, and it was also clear that the buyers could get no assistance from the implied terms in the Sale of Goods Act. No suggestion was made that the goods did not correspond with their description or that they were unmerchantable. The buyers' sole complaint was that the goods were not suitable for their purposes. Unfortunately for them, however, they could not rely on section 14 (1) of the Act, and claim that there was an implied promise that the goods were fit for the purpose for which they were sold, because they were caught by the proviso to section 14 (1). This proviso, it will be recalled, excludes the implied condition where the goods are ordered under a patent or trade name. Manifestly, a person who orders goods under a patent or trade name, must be taken, unless there are special circumstances to the contrary,[36] to have accepted the risk that the goods may not prove suitable for his purpose. This being so it is not surprising that Pilcher J. rejected the buyers' contention that the contract was void. Its acceptance would, in effect, have meant adding a new implied condition to those laid down in the Sale of Goods Act, although it would have been an implied condition rendering the contract void, not placing a liability on the sellers.

Mistake and Impossibility

Where the parties have contracted for the performance of an act which cannot be carried out because of some deficiency in the subject-matter at the time the contract was made, the approach

[34] [1957] 1 W.L.R. 370.
[35] [1953] 1 Q.B. 646.
[36] See, *e.g.*, the hypothetical examples given by Bankes L.J. in *Baldry* v. *Marshall* [1925] 1 K.B. at 266.

of the courts has again been to arrive at and apply the total contract with the same basic possibilities in view, namely, does the total contract place the risk that performance would be impossible on one or other of the parties or on neither? This approach, and the development in the courts' willingness to read implied terms into the literal contract, are illustrated by two cases concerning mistake as to the mineral content of land.

In *Bute* v. *Thompson* [37] the plaintiff had leased a coal mine to the defendant, who agreed to pay a royalty of 8d. for each ton of coal extracted. The defendant also covenanted to extract at least 13,000 tons of coal per year, and further undertook to pay the royalty on 13,000 tons " whether the coals shall be worked or not." On these facts it was held by the Court of Exchequer that it was no defence that there were not 13,000 tons of coal in the whole mine. The arguments of the defence were dismissed by Pollock C.B. as follows:

> " We are of opinion that this stipulation for a fixed rent, coupled with a covenant that coal should be wrought to that extent . . . does not carry with it, by any implication, a condition that there shall be coals to that amount capable of being wrought. It appears to us to be a stipulation on the part of the defendants that they would work and get that quantity, and that if they did not get it, they would pay a fixed rent to the landlord; and we cannot import into that covenant a condition that there should be coals to that extent. If that was the intention of the parties they should have so expressed it." [38]

In *Clifford* v. *Watts* [39] the facts were on all fours with those in *Bute* v. *Thompson*,[40] but the court took a very different view. The plaintiff had leased a clay pit to the defendant, who undertook to dig at least 1,000 tons of clay per year, and to pay a royalty of 2s. 6d. per ton to the plaintiff. The defendant alleged that there was insufficient clay to produce even the first year's quota of 1,000 tons, and it was held that if this were the case, the defendant was not liable for the royalty, although it is not quite clear whether the whole contract was held inoperative. What is clear, however, is that the court treated the question as depending simply on the construction of the contract.

The court distinguished *Bute* v. *Thompson* on the ground that there the lease was intended to secure the lessor a minimum rent whether or not coal was worked or was there to be worked, or in other words that the risk of the coal proving insufficient had in that case been assumed by the lessee. The distinction is, however, unconvincing since the covenant to pay the rent whether the coal was worked or not, was probably intended merely to reinforce the covenant to extract the coal—it is most unlikely that it was inserted

[37] (1844) 13 M. & W. 487.
[38] At pp. 493–494.
[39] (1870) L.R. 5 C.P. 577.
[40] (1844) 13 M. & W. 487.

to take account of the possibility that the coal would prove insufficient. The real distinction between the two cases is that by the time *Clifford* v. *Watts* was decided a change had taken place in the attitude of the courts towards reading implied terms into the literal contract.[41]

Thus it is clear that when the court is free to approach mistake as to subject-matter involving impossibility of performance from the viewpoint of interpreting the contract it will do so. The contrast is very marked between these two cases and *Sheikh Bros.* v. *Ochsner*,[42] where the court was not free to adopt this approach. This was a Privy Council appeal from Kenya, and was governed by the Indian Contracts Act, section 20 of which provides—

> " Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void."

This appears to be a statement of the orthodox English view as to common mistake, and it was so treated by the Privy Council. The appellants, who were landowners in Kenya, had given a licence to the respondents to cut and process all the sisal grown on certain lands owned by the appellants. The respondents agreed to produce an average of at least fifty tons of sisal fibre per month, and to deliver it to the appellants. After a while it transpired that the land in question produced insufficient sisal to enable the respondents to manufacture fifty tons of fibre per month. The Privy Council held that the contract was void for mistake under section 20 of the Indian Contracts Act.

It has been observed on a number of occasions, in particular by Lord Atkin in *Bell* v. *Lever Bros.*,[43] that there is a close relationship between some cases of mistake and cases of frustration. If the contract proves impossible of performance *ab initio* one of the parties may plead that it was void for mistake; if it proves impossible of performance through subsequent events it may be pleaded that the contract is frustrated. Despite the controversy as to the true basis of the doctrine of frustration, it is clear that ultimately cases of frustration, like cases of initial impossibility, turn on the question whether the risk of the impossibility is held to be on one or other of the parties, or on neither. Why then is it that there are so many cases of frustration, and so few cases of contracts being held " void " for initial impossibility?

There are, it is thought, at least three reasons why this should be the case. In the first place, in the nature of things, parties are less likely to enter into contracts which are impossible of performance *ab initio* than into contracts which subsequently become

[41] It may be recalled that *Taylor* v. *Caldwell* (1863) 3 B. & S. 826, the *fons et origo* of the doctrine of frustration, had been decided some seven years previously. Although not referred to in the judgments it was relied on by counsel.

[42] [1957] A.C. 136.

[43] [1932] A.C. at pp. 226–227.

impossible. In the second place, to hold a contract which may have been in operation for some time before the mistake is discovered, to be void *ab initio* is apt to give rise to such practical inconvenience that the courts are reluctant to do it whenever there is any reasonable alternative. In the third place, and to some extent this follows from the previous reasons, a court will much more readily place the risk of initial impossibility on one or other of the parties, than it will the risk of subsequent impossibility.[44] It is in line with what is said above as to the presumption that the promises set out in the literal contract are to be performed, and also accords with common sense, to say that in the ordinary way a person who undertakes to do something implicitly warrants that he can do it, at least in the circumstances existing when the contract is made, or, in others words, that the risk of initial impossibility is generally accepted by each party in relation to his own promises. "It is not competent to a defendant to say that there is no binding contract merely because he has engaged to do something which is physically impossible." [45] This is because in most cases the promisor is in a much better position than the other party to know whether his promises are performable or not, and it is surely not too severe to require that a person should be satisfied before he makes a promise that there is no impediment to its performance. There are, no doubt, exceptional cases, where the promisor has not, and could not be reasonably expected to have, possession of the facts which would show that his promise cannot be performed. There are also the cases of perished goods which are covered by section 6 of the Sale of Goods Act. This section, however, may well be an anachronism in the modern world, because in these days of speedy communications there will usually be little excuse for a seller agreeing to sell goods which have already perished. The position was, of course, different in 1856 when *Couturier* v. *Hastie* [46] was decided, and it is possible that an amendment of section 6 is now required so as to place the risk in such cases on the seller.

The principle that a promisor generally warrants that he can perform his promise does not have the same force in cases of subsequent impossibility, since it may not be reasonable to insist that he impliedly undertakes that he will continue to be able to perform no matter what unforeseeable cataclysms the future may bring.

Closely allied with the cases of impossibility are those of illegality, and in the law of frustration, supervening impossibility and supervening illegality are frequently treated as indistinguishable. This, however, has never been the case with regard to initial impossibility and initial illegality which have always been looked

[44] For this reason it is submitted that it is misconceived to say, as is said in Cheshire & Fifoot (5th ed., p. 179) that "If a contract may be discharged by subsequent impossibility of performance, then *a fortiori* its very genesis is precluded by a present impossibility."

[45] Brett J. in *Clifford* v. *Watts* at p. 588.

[46] (1856) 5 H.L.C. 673.

on as raising entirely different problems. There have been, however, certain recent cases in this field, too, which confirm the growing importance of implied terms. If a person may be held to warrant, however mistakenly, that he can *physically* perform his promises under a contract, is there any reason why he should not be held to warrant that he can *legally* perform them? Until recently this possibility seems never to have occurred to anybody because it has always been uncompromisingly declared that if a contract is illegal *per se* the intention or knowledge of the parties is irrelevant. It now appears that this may not always be the case, and that the severity of the law relating to illegality may be substantially mitigated by the implication of a term that the contract can be legally performed.

Thus in *Shaw* v. *Shaw* [47] it was held by the Court of Appeal that a married man who bigamously "married" a woman who mistakenly believed him to be a widower was to be taken to have warranted that he was legally able to marry her. Although the contract to go through a ceremony of marriage could not be legally performed, and was therefore illegal *per se*, the defendant had contracted that it could be legally performed. As Denning L.J. said: "Every man who proposes marriage to a woman impliedly warrants that he is in a position to marry her." [48]

In this case the promisor himself was not mistaken, being well aware that his real wife was still alive. But should the result have been any different if he had shared the plaintiff's mistake? There are many cases where a man has mistakenly believed that his wife was dead, or that he has secured an effective divorce, and in this belief entered into a marriage that turned out to be bigamous. If the dictum cited above is correct, and it is respectfully submitted that it is, it applies in these cases also. Yet on the orthodox mistake theory the contract to marry would be void, and with it would fall this implied warranty.

Other cases of Mistake as to Subject-matter

If the principles we have been advocating are correct there should be no difficulty in applying them to any other kind of mistake as to subject-matter. There are probably few such cases which do not fall into one or other of the categories already examined, but the most famous and controversial of all, *Bell* v. *Lever Bros.*,[49] remains

[47] [1954] 2 Q.B. 429.

[48] At p. 440. *Cf. Strongman (1945), Ltd.* v. *Sincock* [1955] 2 Q.B. 525, in which an architect owner contracted with a builder for some work, and undertook that he would obtain the necessary licences. When these were not obtained (without the knowledge of the builder) it was clear that the work itself was illegal, and that no action could be brought on the main contract. Nonetheless, the Court of Appeal held that the builder could sue on the express warranty that the architect would get the licences. See also: *Archbolds (Freightage) Ltd.* v. *Spanglett, Ltd.* [1961] 2 W.L.R. 170, especially the judgment of Devlin, L.J. which contains an interesting passage supporting our thesis.

[49] [1932] A.C. 161.

to be briefly discussed. Again it is submitted that there were three basic possibilities:

1. The literal contract providing for compensation for loss of office was to be applied as it stood, the interpretation being that the risk that the service agreement would turn out to be voidable was assumed by Lever Bros.
2. A term was to be implied to the effect that Bell warranted that the service agreement was not voidable by reason of any default of his.
3. A term was to be implied to the effect that Lever Bros.' obligation to pay compensation was inoperative on the facts as they actually were, namely, that the service agreement was voidable.

The second or third of these possibilities would have led to a decision for Lever Bros., but in deciding that Bell was not liable to refund the compensation the House of Lords in effect adopted the first. The presumption that the literal contract was to be carried out had not been displaced, a powerful factor being that the future salary thought to be payable under the service agreement accounted for only a small proportion of the figure of £30,000 fixed as compensation. As Lord Blanesburgh pointed out,[50] on the basis of salary to be lost the maximum figure in prospect for Bell was about £17,000 although even this was far in excess of the value to him of the service agreement on the footing that it was not voidable. He would have had to wait more than two years before getting this full sum in salary, and on termination of his employment was free to take other work at a comparable remuneration, so that his actual loss on the termination of his employment with Lever Bros. amounted to very little indeed. The real inducement for the payment of compensation by Lever Bros. was " the desire tangibly to recognise the exceptional services rendered to Niger by each appellant acknowledged in each letter and even now affirmed: still more perhaps to enlist their support of the amalgamation and to have their assistance in carrying it through in all its details to completion: above all, to secure on May 1 following, the voluntary resignation by each appellant of all his offices, results of value, it may have been of infinite value, to the prospects of a delicate negotiation in the success of which millions of pounds were involved." [51]

Equitable Remedies

Thus far our analysis of mistake as to subject-matter has been in terms of common law and statutory rules. We now suggest that there is no sufficient authority for saying that the basic rules as to the effect of such mistake are any different in equity. The difference in remedies should not be allowed to cause misconception on this.

[50] At pp. 180, 181.
[51] *Per* Lord Blanesburgh at p. 181.

Equity may set aside a contract where the common law would hold it void or inoperative, and in addition possesses such useful remedies as the power to rectify a written agreement and the power to make a declaration of legal rights. But the principles on which relief will be given or denied are, it is submitted, the same under both systems. Here it is necessary to refer to *Solle* v. *Butcher*.[52] The facts were that L granted to T a seven years' lease of a flat for £250 per annum, both parties sharing the mistaken belief that the standard rent of £140 per annum had ceased to apply on the ground that alterations to the flat had changed its identity. If L had served on T a notice under the Rent Acts before executing the lease the standard rent would have risen to £250, but no such notice could be served during the currency of the lease. T, whose mistaken views had been relied on by L, now sued for a declaration that the standard rent was £140 and for the return of his excess rent payments. The Court of Appeal (Jenkins L.J. dissenting) held that the lease should be set aside provided that L undertook, after serving the statutory notice that would then be open to him, to execute another lease on the same terms. The case is referred to here because of Denning L.J.'s novel suggestion, based on a reading of *Cooper* v. *Phibbs*,[53] that a contract which is not void for mistake at law may be voidable for mistake in equity—

> " The mistake there as to the title to the fishery did not render the tenancy agreement a nullity. If it had done, the contract would have been void at law from the beginning and equity would have had to follow the law. There would have been no contract to set aside and no terms to impose. The House of Lords, however, held that the mistake was only such as to make it voidable, or, in Lord Westbury's words, ' liable to be set aside ' on such terms as the court thought fit to impose; and it was so set aside.
>
> " The principle so established by *Cooper* v. *Phibbs* has been repeatedly acted on: see, for instance, *Earl Beauchamp* v. *Winn*,[54] and *Huddersfield Banking Co., Ltd.* v. *Lister*.[55] It is in no way impaired by *Bell* v. *Lever Bros., Ltd.*[56] which was treated in the House of Lords as a case at law depending on whether the contract was a nullity or not. If it had been considered on equitable grounds, the result might have been different. In any case, the principle of *Cooper* v. *Phibbs* has been fully restored by *Norwich Union Fire Insurance Society, Ltd.* v. *William H. Price, Ltd.*" [57]

This reasoning has been severely criticised.[58] We limit ourselves

[52] [1950] 1 K.B. 671.
[53] (1867) L.R. 2 H.L. 149.
[54] (1873) L.R. 6 H.L. 223, 234.
[55] [1895] 2 Ch. 273.
[56] [1932] A.C. 161.
[57] [1934] A.C. 455, 462–463.
[58] Notably by Dr. Goodhart (1950) 66 L.Q.R. 169.

to the following comments on the points made in the above passage—

1. We can find no suggestion in the judgments in *Cooper* v. *Phibbs* or any of the other cases referred to, that contracts not void at law would be set aside in equity on grounds of mistake. On the contrary such passages as bear on the point appear to carry the opposite implication.[59]
2. " Setting aside " a contract often amounts to no more than declaring its ineffectiveness at law and making available equitable remedies. There is ample precedent for " setting aside " contracts that are totally void.[60]
3. The terms imposed by the Court in *Cooper* v. *Phibbs* related to existing rights[61] which could in any case have been enforced independently.
4. In *Bell* v. *Lever Bros.* the claim was for the equitable remedy of rescission, which was in fact granted by the Court of Appeal and disallowed by the House of Lords. It is difficult to see therefore how the House of Lords can be said not to have considered the case on equitable grounds.[62]
5. *Norwich Union Fire Insurance, Ltd.* v. *William H. Price, Ltd.* was decided under the common law rule relating to the recovery of money paid under a mistake of fact. The only reference to *Cooper* v. *Phibbs* in the opinion of the Judicial Committee of the Privy Council was the following, which was

[59] *e.g.*, Lindley L.J. in *Huddersfield Banking Co., Ltd.* v. *Lister* at p. 281: " But I take it that an agreement founded upon a common mistake, which mistake is impliedly treated as a consideration which must exist in order to bring the agreement into operation, can be set aside, formally if necessary, or treated as set aside and as invalid without any process or proceedings to do so. In point of law, the moment you have got rid of the consent order, it is quite plain that an action would lie at law. . . . On the same principle, there are cases in equity, of which *Bingham* v. *Bingham* [1 Ves.Sen. 126] may be referred to as a leading example. . . . "

[60] *Holbrook* v. *Sharpey*, 19 Ves.Jun. 131; *Hayward* v. *Dimsdale*, 17 Ves.Jun. 111; *Peake* v. *Highfield*, 1 Russ. 559; *Bishop of Winchester* v. *Fournier*, 2 Ves.Sen. 445; *Bromley* v. *Holland Tyrrell and Oakden*, 7 Ves.Jun. 3; *Jervis* v. *White*, 7 Ves.Jun. 413; *Wynne* v. *Callender*, 1 Russ. 293; *Kemp* v. *Pryor*, 7 Ves.Jun. 237, at p. 249; *Re Cork and Youghal Ry.*, L.R. 4 Ch.App. 748 at p. 762. The principle was neatly epitomised by Lord Selborne L.C. in *Hoare* v. *Bembridge*, L.R. 8 Ch.App. 22 at p. 27, in comparing the position of a party seeking to have a contract set aside with that of his opponent: " But what the one claims as his right in equity would constitute his defence at law; what the other claims as his right at law would constitute his defence in equity."

[61] *i.e.*, a trustee's lien for money spent on the trust property and an occupation rent for a cottage and land which the lessor was entitled to let.

[62] *Cf.* Lord Blanesburgh: " Finally the claim made by the heads of claim is for rescission of the agreements of settlement, relief properly consequent upon a case of voidability either for fraud or unilateral mistake induced by fraud. But if the allegation, even alternative, was that the agreements were entered into under mutual mistake of fact, then these agreements were not voidable but void *ab initio* . . . " (at p. 190); " Speaking only for myself I feel relieved to take a view of equity and procedure which shields the appellants from [having to repay] " (at p. 200). All the other judgments referred to the position in equity: Lord Warrington of Clyde, agreed to by Viscount Hailsham, at p. 206 (expressly stating the principle to be the same in law and equity); Lord Atkin at pp. 219–221; Lord Thankerton at p. 236.

immediately preceded by a discussion of the common law rules—

> "The mistake [*sc.* in the instant case] was as vital as that in *Cooper* v. *Phibbs* in respect of which Lord Westbury used these words: 'If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake.' At common law such a contract (or simulacrum of a contract) is more correctly described as void, there being in truth no intention to contract. Their Lordships find nothing tending to contradict or overrule these established principles in *Bell* v. *Lever Bros., Ltd.*"

It is respectfully submitted therefore that if, as Denning L.J. held, the mistake in *Solle* v. *Butcher* was not operative at common law [63] there was no jurisdiction to set aside the lease in equity. In the particular circumstances of the case this would no doubt have been a hard decision, but the injustice should be laid at the door of the Rent Acts, and not at the refusal of the common law to hold the contract void or inoperative for mistake. We have already suggested that it is wrong to treat mistake in isolation from questions of express and implied terms, misrepresentation and illegality. So also where a statute provides, as do the Rent Acts, that it is to apply "notwithstanding any agreement to the contrary" the conclusion follows that once the rules of offer and acceptance have been complied with, the resulting contract must be governed by the statute. The relevant statutory provisions are evaded by setting a contract aside for mistake in such a case just as much as they would be by the application of the doctrine of estoppel—which all three judges in the court agreed could not be done.[64] Similarly the rules relating to the rescission of executed leases, or of executed contracts for the sale of goods, as well as the rules restricting a buyer's right of rejection of goods, are in some ways unsatisfactory, but if the courts decline to modify these rules, or if it is not open to them to do so, it is submitted that it would be wrong to sanction their evasion by indirect means, and that the matter should be regarded as one for Parliament alone, as implied by Lord Evershed M.R. in *Leaf* v. *International Galleries*.[65]

Conclusions

Having rejected the theory that mistake as to subject-matter has *ipso facto* a solvent effect on contractual obligations and should therefore be treated as a separate category in the law of contract,

[63] It is not clear from the judgment of Bucknill L.J. whether he shared this view or not. Jenkins L.J. of course did share it, but yet dissented from the majority decision.

[64] Following *Welch* v. *Nagy* [1949] 2 All E.R. 868.

[65] [1950] 2 K.B. 86 at p. 95.

we are faced with the question of whether any rules can be formulated which embody the principles adopted by the courts when confronted with cases of such mistake in the context of a general contractual situation. To attempt to resolve this question now would be beyond our present scope, although we hope to return to it on a later occasion. Meanwhile we content ourselves with the following concluding remarks.

Mistake as to subject-matter is another name for a lack of knowledge, or for partial or incorrect knowledge, of certain relevant facts existing at the time the contract was made. In this sense it may be a factor to be considered by the court in deciding whether the presumption that the literal contract is to be applied has been displaced, or in other words a factor to be considered in arriving at the total contract. However it will have no automatic effect, and must be looked at along with such other factors as: indications that the parties were aware that their knowledge might be incomplete; negligence by the party who was in a position to discover the true facts; the usual course of dealings between the parties as to acceptance of the risk in question; trade customs and practices; intention by one party to deceive the other; degree of likelihood that the facts would not be as supposed; extent to which the mistaken party relied on the skill and judgment of the other.

Furthermore, mistake in this sense may be relevant in assessing the legal effect of a representation. Its presence or absence or degree, in the mind of the representor, may assist the court in deciding whether or not the representation is a term of the contract, and will certainly be relevant in deciding whether the representation is innocent or fraudulent. In the same way the state of mind of the representee must be looked at to see whether the misrepresentation was operative so as to confer on him the remedy of rescission (and, where fraud exists, of damages) or to negative an express term of the contract.

Again, the existence of such a mistake may influence the court in granting a remedy to a person who has entered into an illegal contract. It may affect the measure of damages for breach of contract or the court's discretion in awarding equitable remedies. It is one among the factors that may be relevant in a wide variety of contractual situations, and should accordingly be treated as such.

P. S. ATIYAH.*
F. A. R. BENNION.†

* Of the Inner Temple, Barrister-at-Law.
† Of the Middle Temple, Barrister-at-Law.

THE CHARITIES ACT, 1960

THE Charities Act, 1960,[1] which has already been the subject of an excellent summary in a leading textbook on equity,[2] and of a critical and exhaustive survey in *The Conveyancer*,[3] has repealed either in whole or in part twenty-eight statutes [4] as being obsolete, made consequential amendments in eighteen [5] and superseded forty-seven.[6] In addition, the abolition of the law of mortmain has resulted in the total or partial repeal of no fewer than ninety-five.[7] The " jungle " [8] of statute law has therefore been cleared, but the " undergrowth " [8] of judicial decisions still remains (save in so far as it has been affected by the extension of the *cy-près* doctrine [9] and the abolition of the law of mortmain [10]).

Apart from achieving a thorough consolidation of such of the statute law as it retains, the Act makes a number of important changes. There are, however, two major omissions.

MAJOR OMISSIONS

1. *Definition*

First is the omission of a definition [11] of charity. The Nathan Committee had recommended [12] that (i) the definition of charity by reference to the Preamble to the Charitable Uses Act, 1601, should be repealed, and (ii) in its stead there should be put on the Statute Book a " definition " based on Lord Macnaghten's classification in

1 s. 1 and Sched. I (constitution of the Charity Commissioners), s. 38 and Part II of Sched. VII (repeal of the law of mortmain) and s. 47 (powers of Parliament of Northern Ireland) came into force on July 29, 1960, when the Bill received the Royal Assent. The remainder of the Act came into force on January 1, 1961 (see s. 49 (3)).

2 Snell's *Principles of Equity*, 25th ed., pp. 151–161.

3 Spencer G. Maurice, " The Charities Act, 1960 " (1960) 24 Conv.(N.S.) pp. 390–423.

4 s. 39 and Sched. V.

5 s. 48 (1) and Sched. VI.

6 s. 48 (2) and Part I of Sched. VII. In addition two Church Assembly Measures and six Orders in Council were thereby repealed.

7 ss. 38, 48 (2) and Part II of Sched. VII. In addition eleven Church Assembly Measures were thereby repealed.

8 So described by Prof. G. W. Keeton " Some Problems in the Reform of the Law of Charities " (1960) 13 *Current Legal Problems* at p. 22.

9 ss. 13 and 14; *post*.

10 Doubts of this being achieved were expressed by Prof. Keeton, *loc. cit.* at p. 35.

11 For a discussion of the problems involved see J. W. Brunyate, " The Legal Definition of Charity " (1945) 61 L.Q.R. 262; G. W. Keeton, " The Charity Muddle " (1949) 2 *Current Legal Problems* 102; the Nathan Report on Charitable Trusts (Cmd. 8710) 1952, Chap. 3.

12 *Loc. cit.* para. 140.

Pemsel's case, but preserving the case law as it stood. The Act clearly gives effect to (i) by repealing the whole of the Mortmain and Charitable Uses Act, 1888, and destroying with it the preamble to the Act of 1601 which had hitherto been preserved only by section 13 (2) of the Act of 1888. Presumably the Act also intends to give effect to (ii) by providing in section 38 (4) [13] that " any reference in any enactment or document to a charity within the meaning, purview and interpretation of the Charitable Uses Act, 1601, or of the preamble to it, shall be construed as a reference to a charity within the meaning which the word bears as a legal term according to the law of England and Wales."

The meaning of this subsection is not immediately apparent. Two difficulties come to mind:

(a) Need the reference in the relevant enactment or document to a charity expressly specify that the charity was within the meaning, purview and interpretation of the Act of 1601, or would a reference to charity *simpliciter* impliedly attract the operation of the subsection? In short, does the subsection provide for the interpretation of a gift in favour of " a charity within the meaning of the Act of 1601 " as well as a gift in favour of " charity " *simpliciter*; or does it provide for the former case only? Since the restriction of the subsection to the former case would deprive it of much of its useful meaning, it is submitted that a likely interpretation would be as follows: " Any reference in any enactment or document to a charity which before the passing of this Act would have been held to come within the meaning, purview and interpretation of the Charitable Uses Act, 1601, or of the preamble to it, shall hereafter be construed as a reference to a charity within the meaning which the word bears as a legal term according to the law of England and Wales, regard being had to the repeal of the aforesaid preamble by subsection one of this section."

(b) But it is precisely when regard is had to the repeal of the preamble that difficulty occurs concerning the legal meaning of charity. Hitherto one could say with confidence that, in order

[13] No other section in the Act helps with regard to the problem of definition. S. 45 (1) defines charity as meaning " any institution, corporate or not, which is established for charitable purposes and is subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities." S. 46 defines " institution " as including " any trust or undertaking." The requirement that the institution must be subject to the control of the High Court's jurisdiction with respect to charities excludes from the Act civil corporations in respect of their corporate property, though not, of course, such corporations in respect of property of which they are trustees for charitable purposes. S. 45 (2) (*a*) expressly excludes ecclesiastical corporations in respect of corporate property held for exclusively ecclesiastical purposes. S. 46 simply defines " charitable purposes " as " purposes which are exclusively charitable according to the law of England and Wales."

to be charitable, a trust must have possessed two characteristics [14]: (i) an element of benefit to the community, trusts for the relief of poverty being regarded as exempt from, or as easily satisfying, this requirement; and (ii) a purpose which came within either the express terms or the " spirit and intendment " of the preamble to the Act of 1601, or within the terms of the Recreational Charities Act, 1958. In short it was the preamble which provided the " index or chart " of charitable purposes to which from time to time judicial decisions added glosses that were as often as not restrictive.[15] What then is the effect of the repeal of the preamble? Is the legal meaning of charity now to be ascertained solely from the reported cases from which all references to, and all reasoning based on the existence of, the preamble are to be expunged? There are obvious difficulties in reading the cases in this way; but any other interpretation would render the repeal of the preamble pointless. It would be a case of throwing the preamble out of the front door by section 38 (1) and letting it in at the back by section 38 (4). The likely interpretation, therefore, is that the subsection was intended to provide a new " index or chart " of charitable purposes. This is to be found neither in the express terms nor in the spirit and intendment of the preamble, but in the existing list of purposes already judicially decided to be charitable. Henceforth we are absolved from the necessity of considering the reasoning on which the cases were decided and are confined to the actual results of the decisions. If this is the intention, it is generally to be welcomed,[16] but it is regretted that it was not expressed with greater elegance and less obscurity.

One other matter of definition calls for comment. It was suggested to the Nathan Committee [17] that, as the law then stood, it was not wholly clear that the relief of sickness or of the infirmities of age was a charitable object, unless the condition requiring relief was accompanied by poverty. The Committee, basing itself on *Re Glynn's Will Trusts*,[18] *Re Bradbury* [19] and *Re Hillier*,[20] believed these doubts to be unfounded. Since, however, none of these cases went on appeal, the matter may still be regarded as open. Would

[14] In this connection Lord Macnaghten's classification of charity in *Pemsel's* case was not very helpful. His first three classes—poverty, education and religion—came within the express terms of the preamble, while his fourth and residual class was misleading in so far as it suggested *for a time* that compliance with the requirement of public benefit would by itself be sufficient to make a trust charitable notwithstanding the absence of a purpose within the spirit and intendment of the preamble. This misleading impression was not finally corrected until the decision of the House of Lords in *Williams' Trustees* v. *I. R. C.* [1947] A.C. 447, where the true doctrine is laid down.

[15] See *e.g.*, *Re Sahal's W.T.* [1958] 1 W.L.R. 1243; *Re Cole* [1958] 3 W.L.R. 447.

[16] Subject to the qualification in note 15, *supra*.

[17] *Loc. cit.*, para. 128.

[18] (1950) 66 T.L.R. (Pt. 2) 510.

[19] [1951] 1 T.L.R. 130.

[20] [1944] 1 All E.R. 480; see also *Re Robinson* [1951] Ch. 198; *Re Lewis* [1955] Ch. 104.

not a section declaring the law one way or the other, have been helpful to prevent possible further litigation? A similar comment applies to the doubts, also considered by the Committee to be unfounded, about whether "scientific research" fell within "advancement of education." The Committee thought [21] that it did, at any rate where the gifts in question were to learned societies and institutions. Harman J. has since held [22] that "research" does not, at any rate where the gift is not to a learned society or institution. Was there not enough uncertainty here to merit the attention of the legislature?

2. *Power to invest in purchase of land*

The second major omission from the Act is the power of charity trustees to invest in the purchase of land. The Nathan Committee had recommended [23] that "the acquisition by charitable trusts of freeholds and long leaseholds should be expressly authorised for both investment and functional purposes." Yet neither the present Act nor the Trustees Investments Bill contains a power for trustees, of charity or otherwise, to purchase land as distinct from a power to invest on a mortgage or other security of land. Power to purchase land may, however, be conferred by the Charity Commissioners upon charity trustees [24] either generally or in respect of a particular transaction, unless either a statute (with certain exceptions) or the trusts of the charity expressly prohibit it.[25] It had previously been the practice of the Charity Commissioners to authorise the purchase of land under section 15 of the Charitable Trusts Act, 1860, if they were satisfied of benefit to the trust. The Nathan Committee had no criticism to make of this practice, but nevertheless recommended that charity trustees should be freed from the necessity of seeking the Commissioner's consent to the purchase of land.

Major Reforms

The major changes introduced by the Act concern the following: (1) the reorganisation of the central authorities; (2) the establishment of a central register of charities, the conferment of power upon

21 *Loc. cit.*, para. 128; basing itself on *Re Macduff* [1896] 2 Ch. 451; *Re Bland-Sutton, decd.* [1951] 1 All E.R. 494, *sub nom.* in the House of Lords *Royal College of Surgeons in England* v. *National Provincial Bank, Ltd.* [1952] A.C. 631.

22 *Re Shaw* [1957] 1 W.L.R. 729, also basing himself on *Re Macduff*; *cf.* s. 69 of the War Damage Act, 1943, which regarded land held for the advancement *inter alia* of research as being held for charitable purposes.

23 *Loc. cit.*, paras. 294, 298.

24 Defined in s. 46 as "the persons having the general control and management of the administration of a charity." It seems that "managers" and "persons in control" are included whether or not they are trustees in a technical sense.

25 s. 23, which covers any action proposed or contemplated in the administration of a charity which is expedient in the interests of the charity, including authority for a charity to use common premises, or employ a common staff, or otherwise combine for any purpose of administration, with any other charity. It need hardly be said that resort to s. 23 is unnecessary if the trusts of the charity expressly confer power to purchase land.

local authorities to maintain an index of "local charities," [26] and the creation of a basis for voluntary co-operation between charities and local authorities [27]; (3) the extension of the *cy-près* doctrine and the application of the scheme-making power to charities governed by Royal Charter or by certain statutes; (4) the improvement of machinery for the guidance and supervision of charities by the court and the central authorities; (5) the enactment of clear provisions restricting dealings with charity property; (6) the repeal of the law of mortmain; and (7) the addition of a class of *excepted* charities to the already existing class of *exempt* charities.

1. *The reorganisation of the central authorities*

The two central authorities exercising jurisdiction over charities continue to be the Charity Commissioners [28] and the Minister of Education.[29]

The Charity Commissioners

Provision is now made for the appointment of lay Commissioners. The number of Commissioners will normally be three, of whom at least two must be barristers or solicitors; but a maximum of two additional Commissioners may be appointed with the approval of the Treasury. Future [30] appointments will be made by the Home Secretary and not by the Queen. Subject to a saving clause in respect of existing office-holders, the Commissioners are deemed for all purposes to be in the civil service of the Crown.

The office of Parliamentary Charity Commissioner disappears: in his place the Home Secretary will answer questions in Parliament concerning the Charity Commission. At the same time, it appears that the Commissioners are free from the control of the Home Secretary both in respect of their judicial functions, from whose exercise appeal lies to the High Court, and their administrative work.[31] Section 1 (3) and (4) expressly gives to the Commissioners the independent function of promoting the effective use of charitable resources by encouraging the development of better methods of administration, by giving charity trustees information or advice on any matter affecting the charity and by investigating and checking abuses; and requires them so to act [32] in the case of any charity

[26] Defined by s. 45 as meaning "in relation to any area, a charity established for purposes which are by their nature or by the trusts of the charity directed wholly or mainly to the benefit of that area or of part of it."

[27] See especially ss. 11 and 12.

[28] s. 1 and Sched. 1. [29] s. 2.

[30] Existing office-holders are entitled to continue in office as if the Act had not been passed: Sched. I, para. 1 (6).

[31] By contrast, the Minister of Education appears to be directly responsible to Parliament where he acts in relation to charities whose purposes bring them within his jurisdiction. There is no Educational Charities Commission interposed between him and the trustees of educational charities: s. 2 (5).

[32] The Commissioners themselves cannot act in the administration of a charity: s. 1 (4).

(unless it is a matter of altering its purposes) as best to promote and make effective the work of the charity in meeting the needs designated by its trusts. The ultimate responsibility of the Commissioners to Parliament is secured by the requirement that they must make an annual report on their work to the Home Secretary, and he must lay a copy of the report before each House.

The Minister of Education

Hitherto the jurisdictions of the Commissioners and the Minister have been mutually exclusive. Section 2 now makes them concurrent except that (i) subsection (4) of that section requires the Minister to continue to discharge the functions conferred by the Endowed Schools Act, 1869, and subsequent Acts on the Commissioners established by that Act, and (ii) subsection (2) envisages a division of jurisdiction being made by Order in Council. Failing an Order the subsection requires the Minister to act in relation to charities whose purposes are wholly or mainly of concern to him in connection with his general functions relating to education, and the Commissioners to act in other cases. Difficulties arising from doubts as to where jurisdiction lies are to some extent reduced by subsection (3) which, while requiring applicants to make requisite applications and give requisite notices to the appropriate authority, nevertheless validates the consequences of an approach to the wrong authority. The difficulties may be expected to be minimal if there is close liaison between the Commissioners and the Ministry.

The Official Custodian for Charities

An important organ of the Commissioners will be the " Official Custodian for Charities," [33] who replaces the Official Trustee of Charity Lands and the Official Trustees of Charitable Funds. Section 16 empowers the court, and section 18 the Commissioners,[34] to vest any property held in trust for charity in the Official Custodian. Personal property, including real security but no other interest in land, which is held on trust for charity or is the subject of a bequest to charity, may be vested in the Official Custodian with his agreement and without an Order. The court may discharge the Official Custodian from his trusteeship and make consequential vesting orders. Persons acting in conformity with an order of the court are protected from liability in respect of any loss occasioned by their so acting. No vesting of any property in pursuance of the

[33] s. 3; by s. 48 (6) all property vested in his predecessors now vests in the Official Custodian and all references to his predecessors now have effect as references to him. The Official Custodian is a corporation sole with an official seal (s. 3 (1)); is subject to the directions of the Commissioners (s. 3 (3)); is not liable for loss of trust property vested in him except in cases of wilful neglect or default (s. 3 (5)); and must keep accounts which must be examined by the Comptroller and Auditor General (s. 3 (6) and (7)).

[34] Subject to certain limitations: *post*.

section is to operate as a breach of a covenant against alienation or give rise to a forfeiture.

Section 17 emphasises the nature of the Official Custodian's functions. He may be made, by order of the court or with his agreement, the repository of title to property and of the documents of title [35] thereto; but powers of management are reserved for the charity trustees [36] who can, in relation to land vested in the Official Custodian, execute assurances in his name and on his behalf for carrying out transactions authorised by the court or the Commissioners or for granting leases for terms of up to twenty-two years without a fine, or for accepting the surrender of leases. Again, in relation to such land, it is the charity trustees who have power to make obligations entered into by them binding on the land as if it were vested in them.

The Minister of Education has no functions in relation to the Official Custodian,[37] nor, generally speaking, can he vest property in him. Exceptionally, he may do so (i) where as a result of misconduct or mismanagement in the administration of a charity under his jurisdiction, the property of the charity requires protection,[38] or (ii) where a common investment fund has been established.[39]

2. *The central register and local indices*

The central register

Section 4 (1) makes it the duty of the Commissioners [40] to establish and maintain a register of charities, in which such particulars must be entered as the Commissioners may from time to time determine. Exempt [41] and excepted [41] charities are not required to be registered, but may be registered at their own request. If registered, they may at any time, and must at their own request, be removed from the register. The same applies [42] to any charity if it does not have (i) any permanent endowment [43]; *or* (ii) any income from property amounting to more than £15 a year,[44] *or* (iii) the use

[35] He may permit these to be in the possession of the charity trustees without incurring personal liability: s. 17 (6).

[36] Except in the case of common investment funds: s. 22 (6), *post*.

[37] s. 3 (8).

[38] s. 20 (1) (ii), (11).

[39] s. 22 (6), (12).

[40] s. 4 (10) envisages that part of the register *may* be maintained by the Minister of Education.

[41] s. 4 (4) (*a*) and (*b*).

[42] s. 4 (4) (*c*). In addition no charity is required to be registered in respect of any registered place of worship: s. 4 (4) and (9).

[43] Subject to s. 22 (9) (which deals with common investment funds) a charity is deemed to have a permanent endowment unless all property held for the purposes of the charity may be expended for those purposes without distinction between capital and income, and permanent endowment means property held subject to a restriction on its being so expended: ss. 45 (3) and 46.

[44] To be ascertained by reference to the gross revenues of the charity, without bringing into account the yearly value of any land occupied by the charity apart from the pecuniary income (if any) received from that land.

and occupation of any land. It is the duty of the charity trustees of any registrable charity to apply for registration; to supply copies of its trusts (or, if they are not set out in any extant document, particulars of them), and any other documents or information which may be prescribed; and to notify the Commissioners if their charity ceases to exist or if there is any change in its trusts.[45] But no person is required to supply the Commissioners with copies of schemes for the administration of a charity made otherwise than by the court, or of any document or copy already in the possession of the Commissioners or the Minister.[46] The register, together with copies (or particulars) of the trusts of any registered charity and copies of schemes for the administration of a charity, which are already in the possession of the Commissioners, will be open to public inspection at all reasonable times.[47] Registration of new charities must be effected as soon as they take effect, of existing charities at dates to be prescribed.[48] Save for purposes of rectification the entry on the register is conclusive proof of the charitable nature of the institution.[49] Any affected person may object [50] to such entry and there is a right of appeal from the Commissioners' decision to the High Court at the suit of the Attorney-General, the real or alleged trustees or the affected person.[51] Pending the decision on appeal the entry is shown as in suspense and no presumption arises during this time.[52] The Commissioners may reconsider any question affecting registration or removal in the light of changed circumstances or subsequent judicial decisions.[53] Furthermore, it is the duty of the Commissioners to remove from the register any institution which no longer appears to them to be a charity, or which ceases to exist or which does not operate.[54]

45 s. 4 (5) and (6).
46 s. 4 (8).
47 s. 4 (7) and (8): copies or extracts are obtainable at reasonable fees: s. 9 (2).
48 s. 4 (10). By the Charities (Registration) (Commencement No. 1) Order, 1961, June 22, 1961, has been prescribed as the date of registration of charities in Bedfordshire and Surrey, including Croydon.
49 s. 5 (1).
50 s. 5 (2). Regulations will lay down the procedures for objections and applications. The Commissioners of Inland Revenue, next-of-kin and residuary legatees are obviously persons affected by registration or non-registration. So are members of the public: presumably, the regulations will enable frivolous applications to be summarily disposed of. Mr. Spencer Maurice, *loc. cit.* at p. 403, considers that no time limit was laid down, because a limit would be inappropriate. *Quaere*, however, whether the limitation provisions of the Income Tax Act, 1952 (unhelpful as they are to the taxpayer), and of the Limitation Act, 1939, do not apply. Mr. Maurice's example is not apt. He puts the case of a testamentary gift to charity where there is a long interval between the making of the will and the death of the testator. He then supposes that the gift was registered from the date of the making of the will. But, surely, registration cannot take place until the death of the testator: from that date the Limitation Act provisions apply to residuary legatees and next-of-kin.
51 s. 5 (3).
52 s. 5 (4).
53 s. 5 (5).
54 s. 4 (3).

In order to facilitate decisions as to whether an institution ought to be treated as established for charitable purposes the Commissioners may exchange information as to the purposes of the institution with the Commissioners of Inland Revenue and other government departments and local authorities. A similar exchange is permitted with regard to information concerning the names and addresses of institutions which have for any purpose been treated as established for charitable purposes.[55] Useful though this provision is, it is unlikely to resolve the still considerable difficulties inherent in determining when an institution is established for charitable purposes. Exchange of information may lead to quicker recognition of the difficulties, but it does not make their solution any easier. Hence, the number of cases, in which resort to the court is necessary, is unlikely to diminish: the only difference made by the Act is that objection to the entry of an institution in, or application for its removal from, the register must be made to the Commissioners before an appeal will lie to the court.[56]

Local indices

Whereas the maintenance of the central register is mandatory, the establishment of an index of local charities is permissive.[57] The power is available to county and borough councils,[58] but not to urban district councils until adopted by resolution of the council.[59] A council may delegate the maintenance of a local index to any voluntary organisation; a county council may delegate either to the council of any county district in the county or to the divisional executive (within the meaning of Part III of the First Schedule to the Education Act, 1944) for any part of the county.[60] A joint board discharging any of a council's functions has the same power as a council with regard to local charities in the council's area which are established for purposes similar or complementary to any services provided by the board.[61]

It may be assumed that a local index will be little more than a duplicate of the relevant entries in the central register. Nevertheless, it will provide useful and, in some cases, vital information, particularly where a council desires to exercise its power to initiate and carry out reviews of local charities or to co-ordinate its activities and those of any charity providing similar services.[62]

55 s. 9 (1).

56 For a more optimistic view, see Spencer G. Maurice, *loc. cit.* at p. 401.

57 s. 10 (1).

58 Including boroughs included in a rural district, metropolitan boroughs in London and the common council of the City of London.

59 s. 10 (6): copies of the resolution must be sent to the Commissioners, the Minister of Education, and the county council in which the urban district is situated.

60 s. 10 (4).

61 s. 10 (5).

62 Under ss. 11 and 12.

3. *The extension of the cy-près doctrine and the application of the scheme-making power to charities governed by Royal Charter or by certain statutes*

The cy-près doctrine

Hitherto, the application of the *cy-près* doctrine necessitated compliance with two requirements: first, the trusts must have been, or have become, impossible or impracticable; and secondly, in many, but not all, cases, the donor must have manifested a general charitable intention.

The first requirement was reasonably easy to satisfy, for trusts would be held " impossible " or " impracticable " if their performance was " highly undesirable." [63] On the other hand, there had to be at least a technical impossibility: it was not sufficient that the performance of the trust in some other way would be more beneficial to the community so long as it remained possible to perform it in the way specified by the donor.[64]

The existence of a general charitable intention depended on the construction of the instrument of gift, if any, or otherwise on the effect of the evidence. A gift to a charitable institution that had never existed raised a presumption of general charitable intention.[65] The failure of a condition attached to a charitable gift pointed to a particular charitable intent [66]; but the absence of any condition at all was no indication one way or the other.[67] The inclusion of the gift among other gifts to charities pointed to a general charitable intention,[68] as did the source of the gift in several small anonymous donations, at any rate in cases of supervening,[69] as distinct from initial,[70] impossibility. Indeed, in cases of supervening impossibility, a general charitable intention appears not to have been required, or if it was, it was readily construed to exist.[71] Nor was it required where there was a gift to a charity by a particular name or description and, at the time when the gift took effect, the charity had changed its name or been otherwise altered under a scheme. In such a case the gift took effect as a gift to the charity under its new name.[72] Again the question of general charitable intention was irrelevant if the institution ceased to exist after a legacy had vested in it. In such cases the legacy, together with the other property of

63 *Re Dominion Students' Hall Trust* [1947] Ch. 183.
64 *Re Weir Hospital* [1910] 2 Ch. 124.
65 *Re Harwood* [1936] Ch. 285; presumption rebutted when the will also included a residuary gift to charity: *Re Goldschmidt* [1957] 1 W.L.R. 524.
66 *Re Wilson* [1913] 1 Ch. 314.
67 *Re Good's Will Trusts* [1950] 2 All E.R. 653.
68 *Re Knox* [1937] Ch. 109.
69 *Re North Devon & West Somerset Relief Fund Trusts* [1953] 1 W.L.R. 1260.
70 *Re Ulverston & District New Hospital Building Trusts* [1956] Ch. 622.
71 *Re Wright* [1954] Ch. 347.
72 *Re Faraker* [1912] 2 Ch. 488; *Re Lucas* [1948] Ch. 424; *Re Hutchinson's Will Trusts* [1953] Ch. 389; *Re Bagshaw* [1954] 1 All E.R. 227; *cf. Re Rymer* [1895] 1 Ch. 19, where the institution simply ceased to exist during the testator's lifetime.

the institution, passed to the Crown, which would, of its clemency, allow the legacy to be applied *cy-près*.[73]

Sections 13 and 14 of the Act modify both of the above requirements. Section 13 (1) consolidates and, to some extent, extends the circumstances in which the original purposes of a trust may be said to be, or to have become, impossible or impracticable. These circumstances now are:

(a) where the original purposes, in whole or in part:
  (i) have been as far as may be fulfilled,[74] or
  (ii) cannot be carried out, or not according to the directions given and to the spirit of the gift [75]; or

(b) where the original purposes provide a use for part only of the property available by virtue of the gift [76]; or

(c) where the property available by virtue of the gift and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the spirit of the gift, be made applicable to common purposes [77]; or

(d) where the original purposes were laid down by reference to an area which then was but has since ceased to be a unit for some other purpose, or by reference to a class of persons or to an area which has for any reason since ceased to be suitable, regard being had to the spirit of the gift, or to be practical in administering the gift [78]; or

(e) where the original purposes, in whole or in part, have since they were laid down—
  (i) been adequately provided for by other means; or
  (ii) ceased, as being useless or harmful to the community, or for other reasons, to be in law charitable [79]; or

[73] *Re Slevin* [1891] 2 Ch. 236; *Re Moon's Will Trusts* [1948] 1 All E.R. 300, where the gift to the institution was to take effect after a life interest, during which the institution was discontinued.

[74] This is already covered by existing case-law.

[75] Apart from the phrase "the spirit of the gift" this is also already covered.

[76] Also already covered.

[77] Apart from "spirit of the gift" already covered, at least in cases of identical purposes: *Re Harvey* [1941] 3 All E.R. 284. In that case, however, the court exercised jurisdiction under s. 57 of the Trustee Act, 1925: under s. 13 of the present Act jurisdiction is conferred on the Commissioners and the Minister as well as the court.

[78] The first limb is perhaps covered by "impracticability"; the second is an extension, quite apart from the introduction of the concept "spirit of the gift"; "unsuitability" by itself was never an occasion for applying the *cy-près* doctrine: *Re Weir Hospital* [1910] 2 Ch. 124. Without prejudice to this paragraph s. 13 (4) empowers the court, where the purposes for which the property is held are laid down by reference to certain areas mentioned in Sched. III to the Act, to provide for enlarging the area to any area also specified in that Schedule. The third limb is difficult to construe grammatically.

[79] This is probably covered by existing law and is meant to give effect to Lord Simonds' opinion in *National Anti-Vivisection Society* v. *I.R.C.* [1948] A.C. 31 at 64, 65: "If, by a change in social habits and needs, or, it may be, by

(iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the spirit of the gift.[80]

The net gain appears to be rather small, though the tidying-up is to be welcomed. On the other hand, the introduction of the phrase " spirit of the gift " without any indication as to where this is to be found may prove to be troublesome. The adoption of the phrase was recommended by the Nathan Committee [81] who borrowed it from section 116 of the Education (Scotland) Act, 1946, where it appears as " the spirit of the intention of the founders as embodied either (i) in the original deed constituting the endowment where it is still the governing instrument, or (ii) in any scheme affecting the endowment." Even if so read, it must mean something more than the intention of the founder and must include the motives which " inspired " his gift. The generosity thus accorded to *cy-près* is difficult to reconcile with the harshness shown to imperfect trust provisions represented by the " charitable or benevolent " cases.[82] The Nathan Committee excluded the latter from the possibility of permanent reform on the ground that [83]: " A testator must say what he means in words apt in law to achieve the purpose he desires and, consequently, he must be taken to have meant what he said. From this it follows that every will must be construed as it stands. To require the court to determine, not what the testator has said but what he intended to say, would be to throw an intolerable burden on it, and to create a state of uncertainty in the minds of all testators and their legal advisers as to what meaning might eventually be read into their words." Apparently, the burden on the court is not expected to be intolerable in cases of *cy-près*.

Section 13 (2) preserves the requirement of " general charitable intention " so far as that requirement is necessary under existing law. But section 14 introduces an important retrospective modification.[84] Hitherto, as already seen, the *cy-près* doctrine was not

a change in the law, the purpose of an established charity becomes superfluous or even illegal, or if, with increasing knowledge, it appears that a purpose once thought beneficial is truly detrimental to the community, it is the duty of the trustees of an established charity to apply to the court, or, in suitable cases, to the Charity Commissioners, or, in educational charities, to the Minister of Education, and ask that a *cy-près* scheme may be established. A charity once established does not die, though its nature may be changed. But it is wholly consistent with this that in a later age the court should decline to regard as charitable a purpose, to which, in an earlier age, that quality would have been ascribed." S. 13 (5) of the Act declares the duty of trustees to be that stated by Lord Simonds, above.

80 This appears to be an extension: " unsuitability " was previously not an occasion for applying the *cy-près* doctrine.

81 *Loc. cit.*, para. 365.

82 The reforms introduced by the Charitable Trusts Validation Act, 1954, are limited to " imperfect trust provisions " which took effect before December 16, 1952, the date of the publication of the Nathan Committee's Report.

83 *Loc. cit.*, para. 535.

84 s. 14 (7).

applicable where a charitable trust failed *ab initio* unless there existed a general charitable intention on the part of the donors.[85] In cases of initial failure of anonymous donations for specific charitable purposes, the court would, in the absence of a claim by the Crown to the donations as *bona vacantia*, declare a resulting trust in favour of the anonymous donors. But in all probability the money paid into court would remain there in idleness pending claims which the anonymous donors would be unlikely to make, if only because of the expense.

Section 14 (1) now provides that property [86] given for specific *charitable* [87] purposes which fail shall be applicable *cy-près* as if given for charitable purposes generally, where it belongs (a) to a donor [88] who, after such advertisements and inquiries as are reasonable, cannot be identified or cannot be found; or (b) to a donor who has executed a written disclaimer of his right to have the property returned.[89] The proceeds of cash collections made by means not adapted for distinguishing one gift from another and the proceeds of lotteries and similar money-raising activities are conclusively presumed (without advertisement or inquiry) to belong to unidentifiable donors.[90] Moreover, the court may dispense with advertisement or inquiry, where it would be unreasonable, having regard to the amounts likely to be returned to the donors, to incur expense with a view to returning the property; or where having regard to the nature and amount of the gifts and to the lapse of time since they were made, the donors would not reasonably expect to get the property back.[91] In cases where the conclusive presumption applies, or the court dispenses with inquiry, donors cannot make a claim: in other cases they can reclaim a proportionate [92] part of their contributions within twelve months of a *cy-près* scheme being made.[93]

The section is not expressly limited to cases of failure *ab initio*. But it is submitted that it does not extend to cases of supervening impossibility, where the property is applicable *cy-près* under existing case law even in the absence of a general charitable intention. The principle is stated in *Tudor on Charities* as follows [94]: " The importance of the distinction [*i.e.*, between initial and supervening failure] lies in the fact that the *cy-près* principle is confined to

[85] *Re Ulverston & District New Hospital Building Trusts* [1956] Ch. 622.
[86] Including its traceable proceeds: s. 14 (6).
[87] The Act does not help in a case such as *Re Gillingham Bus Disaster Fund* [1959] Ch. 62 where the gift was not charitable at the outset and not rendered charitable by the Charitable Trusts Validation Act, 1954.
[88] Including persons claiming through or under him: s. 14 (6).
[89] Apart from this provision, disclaimer might have resulted in the property being *bona vacantia*.
[90] s. 14 (2).
[91] s. 14 (3).
[92] *i.e.*, their contributions less their proportion of the expenses properly incurred by the trustees.
[93] s. 14 (4).
[94] 5th ed., p. 14.

property given with a general intention of charity. There is an exception to this rule concerning property given absolutely and perpetually to charity, and which has vested in the charity: in such circumstances a rule of convenience has grown up that on the subsequent failure of the trusts, the fund can be applied *cy-près* irrespective of the donor's intention." This submission is consistent with section 14 (5) of the Act which provides that " for the purposes of this section, charitable purposes shall be deemed to ' fail ' where any difficulty in applying property to these purposes makes that property or the part not applicable *cy-près* available to be returned to the donors." In cases of absolute and perpetual gifts to charity for purposes which subsequently failed no part of the property was ever available to be returned to the donors. If this is correct, then in future *cy-près* will apply in the absence of a general intention of charity to cases of initial failure only after the requirements of advertisement or inquiry (where appropriate) and of written disclaimer under section 14 of the Act have been complied with: *cy-près* will continue to apply to cases of supervening failure without the necessity of complying with those requirements.

The application of the scheme-making power to charities governed by Royal Charter or by statute

Hitherto, where a charity was established or regulated by Royal Charter *cy-près* schemes could not be made by the court or Commissioners if the result would have been to alter the Charter. Section 15 (1) now empowers the court to make a *cy-près* scheme notwithstanding that it may result in the alteration of the Charter but the scheme is to be so framed that it does not purport to come into effect unless or until the Charter is amended by Order in Council.[95] Further, in relation to charities governed by the statutes mentioned in Schedule IV, section 15 (3) confers scheme-making jurisdiction on the court notwithstanding that the resulting schemes may modify or supersede provisions contained in those statutes.

4. *The improvement of machinery for the guidance and supervision of charities by the court and the central authorities*

The Act contains a number of provisions relating to the guidance and supervision of charities by the court and the central authorities. The most important concern the following matters:

(a) *Power to institute inquiries, to call for documents, to search records, and to act for the protection of charities*

Sections 6 and 7 replace, with modifications, the existing powers [96] of the Commissioners with regard to charities, to call for

[95] By s. 15 (2) an Order in Council is sufficient in any case in which the Charter could be amended by the grant and acceptance of a further charter.

[96] Under the Charitable Trusts Act, 1853, ss. 9–12, 14–15; the Charitable Trusts Amendment Act, 1855, ss. 6–9; and the Charitable Trusts Act, 1860, s. 19.

documents and search records. The most important change is the provision enabling the Commissioners to pay the expenses of persons required to attend an inquiry for the purpose of giving evidence or producing documents and entitling a person to refuse to go to an inquiry more than ten miles from his place of residence unless his expenses are paid.[97]

Section 20, which is new, empowers the Commissioners to take steps to protect property belonging to a charity,[98] or to secure the proper application thereof, where they are satisfied, as the result of an inquiry instituted under section 6, that misconduct or mismanagement has occurred. Misconduct or mismanagement includes the employment for excessive remuneration of persons acting in the affairs of the charity. Steps taken by the Commissioners may include the removal [99] of a trustee, or other officer, of a charity who has been responsible for or privy to the misconduct; the vesting of property [1] held in trust for the charity in the official custodian for charities; the "freezing" of bank accounts and of securities held by a bank or other person on behalf of the charity; and the restriction of transactions which may be entered into, or of the nature or amount of payments which may be made, in the administration of the charity. In addition, the Commissioners may, of their own motion, make orders removing a charity trustee in case of his conviction of felony, bankruptcy, inability to act by reason of mental disorder, failure to act or absence outside England and Wales which impedes the proper administration of the charity. They may, also of their own motion, appoint new trustees in place of those removed by them as well as in cases where for one reason or another the charity cannot apply for the appointment. They may also appoint one [2] or more [3] additional trustees where it is necessary for the proper administration of the charity and the circumstances, mentioned in the Act, exist.[4] The Commissioners must give notice of their intention to exercise jurisdiction under the section to each of the charity trustees, except any that cannot be found or has no known address in the United Kingdom. A trustee, or other officer, of a charity who has been removed from his trusteeship may appeal to the court without a certificate of the Commissioners and without the leave of a judge of the Chancery Division.[5]

97 Hitherto the right to refuse to travel more than 10 miles was absolute: Charitable Trusts Act, 1853, s. 12; Charitable Trusts Amendment Act, 1855, s. 7.

98 Other than an exempt charity: s. 20 (12).

99 Including the suspension for a period not exceeding three months pending the consideration of his removal: s. 20 (8).

1 Exceptionally, the Minister of Education may also do this: s. 20 (11); *ante* p. 449.

2 s. 20 (4) (*d*).

3 s. 20 (4) (*c*).

4 The powers of removal and appointment include power to make consequential vesting orders as under s. 18 of the Act: s. 20 (5).

5 s. 20 (7). A certificate or leave is required in cases of removal under s. 18: see s. 18 (10) and (11).

(b) *Power to make schemes*

By section 18 [6] the Commissioners and the Minister [7] have the same jurisdiction [8] and power as the court in charity proceedings [9] to establish schemes for the administration of a charity; to appoint, discharge,[10] or remove trustees or other officers of a charity; and to vest or transfer property. Disputes as to title to property,[11] questions involving the existence or extent of any charge or trust,[11] contentious matters [12] and cases involving special questions of law or fact[12] are reserved for the court. Generally, the Commissioners are required to act only on the application of the charity concerned or on reference from the court. Exceptionally in the case of a charity (other than an exempt charity) whose income does not exceed £50 a year they may act on the application of the Attorney-General, of one or more of the charity trustees, of any person interested in the charity, or of any two or more inhabitants of the area of the charity, if it is a local charity.[13] In the absence of an application the Commissioners may make a scheme if (a) the charity is not an exempt charity; (b) they are satisfied that the charity trustees have unreasonably neglected to apply for a scheme which the interests of the charity required; (c) they have applied to the Home Secretary for him to refer the case to them, and (d) the Home Secretary, after giving the charity trustees an opportunity to make representations to him, has so referred the case.[14] The Minister may himself proceed with a view to a scheme in the circumstances in which the Commissioners are required to apply to the Home Secretary for him to refer a case to them.[15] The Commissioners must give notice of their intention to exercise jurisdiction to each of the charity trustees except any who cannot be found or has no known address in the United Kingdom or who is a party to the application.[16] Appeals against any order of the Commissioners may be brought as follows:

(i) by the Attorney-General at any time and without leave [17];
(ii) by the charity, or any of the charity trustees, or any officer removed from his office without the consent of the charity

[6] Replacing with amendments the Charitable Trusts Act, 1853, s. 43; the Charitable Trusts Act, 1860, ss. 2–3, 5–8; the Charitable Trusts Act, 1869, ss. 4 and 5.
[7] By virtue of s. 2 (1).
[8] Either on application of the charity or on reference from the court, s. 18 (4) (2).
[9] "Charity proceedings" are defined by s. 28 (8) *for the purposes of that section* as meaning "proceedings in any court in England and Wales brought under the court's jurisdiction with respect to charities, or brought under the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes."
[10] Including the discharge of a trustee at his own request: s. 18 (7).
[11] s. 18 (3).
[12] s. 18 (9).
[13] s. 18 (5).
[14] s. 18 (6).
[15] s. 18 (13).
[16] s. 18 (8).
[17] s. 18 (10).

trustees, within three months and with either a certificate of the Commissioners or leave of a judge of the Chancery Division [18];

(iii) by any person interested in the charity against an order establishing a scheme within the time and subject to the leave required in (ii) [19];

(iv) in the case of a local charity, by (a) any two or more inhabitants of the area within the time and subject to the leave required in (ii) and (b) the parish council of any rural parish comprising the area within the time and subject to the leave required in (ii) and subject also to the consent of the parish meeting.[19]

Section 19 replaces, with amendments, the Commissioners' existing powers [20] to make schemes for confirmation by Parliament in cases where the trusts, having been established by an Act of Parliament, could not ordinarily be altered except by another Act, or where the scheme might go beyond the powers exercisable by the Commissioners under their ordinary jurisdiction. Schemes under this section are given effect by order of the Home Secretary or of the Minister made by statutory instruments the draft of which requires the approval of both Houses of Parliament.[21] The Commissioners are not entitled to proceed under the section without the like application or the like reference from the Home Secretary, and the like notice to the charity trustees, as would be required if they were proceeding (without an order of the court) under section 18 of the Act.[22] An important innovation is contained in subsection (8) which enables the Commissioners by order to authorise charity trustees to apply accrued or accruing income *cy-près* in anticipation of the establishment of a scheme. Before doing so, the Commissioners must be satisfied that (a) the whole of the income cannot in existing circumstances be effectively applied for the purposes of the charity; (b) if those circumstances continue, a *cy-près* scheme would be desirable; and (c) it is not yet desirable to make such a scheme. The expenditure of accrued income must not exceed £300, and of accruing income £100 a year for more than three years after the order of the Commissioners.

(c) *Power to establish common investment funds*

Section 22, which is new, gives effect, with modifications, to a recommendation of the Nathan Committee [23] and enables the court

[18] s. 18 (11).
[19] s. 18 (12).
[20] Under the Charitable Trusts Act, 1853, ss. 54–60; the Charitable Trusts Amendment Act, 1855, s. 43; the Charitable Trusts Act, 1925, s. 2.
[21] s. 19 (1) (2) (3) and (9).
[22] *Cf.* the powers of the court under s. 15 (3) in respect of charities established by the statutes mentioned in Sched. IV: *ante* p. 457.
[23] Paras. 555–557. The Committee called them "unified trust funds" and would have limited them in the first instance to local charities having a gross annual value of less than £100.

or the Commissioners to make schemes for the establishment of common investment funds. The essence of a common investment scheme is that property transferred to the fund by participating charities is invested under the control of trustees appointed to manage the fund, and the participating charities are entitled to the capital and income of the fund in shares determined by reference to the amount or value of the property transferred to it by each of them and to the value of the fund at the time of the transfer.[24] A common investment scheme may make detailed provisions for the management and winding up of the fund, including provision for the remuneration of the managing trustees; for regulating the size of the fund and the amount of withdrawals from it; for regulating distribution of income; for the temporary borrowing of money for the purpose of making payments; for enabling all questions to be conclusively determined by the managing trustees; for regulating the accounts to be supplied to the participating charities [25]; for enabling sums to be deposited at interest, in the fund by non-participating charities [26]; and for prohibiting the rights of a participating charity in the fund from being assigned or charged.[27] A common investment fund is deemed for all purposes to be a charity and its assets are regarded as a permanent endowment, unless the fund is restricted to charities having no permanent endowment.[28] Contrary to the normal rule applicable to him,[29] the Official Custodian may be appointed managing trustee of a common investment fund by or with the approval of the Commissioners [30] or the Minister.[31] Where the Official Custodian acts as managing trustee, the scheme must make provision for him to be advised by a committee of persons who have special experience of investment and finance or of the administration of trusts.

(d) *Power to authorise dealings with charity property*

The power conferred by section 23 [32] of the Act on the Commissioners to authorise dealings with the charity property, which are in the interests of the charity, has already been considered.[33]

(e) *Power to authorise taking of legal proceedings*

Section 28 [34] enables the Commissioners to authorise proceedings to be taken with reference to a charity either by the charity, or by

[24] s. 22 (1).
[25] s. 22 (4).
[26] s. 22 (5).
[27] s. 22 (7).
[28] s. 22 (9).
[29] *Ante* p. 449.
[30] s. 22 (6).
[31] s. 22 (12).
[32] Replacing the Charitable Trusts Act, 1853, ss. 23 and 64; and the Charitable Trusts Amendment Act, 1855, ss. 31–34 and 46.
[33] *Ante*, pp. 447.
[34] Replacing with modifications ss. 17 and 18 of the Charitable Trusts Act, 1853.

any of the charity trustees, or by any persons interested in the charity, or by any two or more inhabitants of the area of the charity, if it is a local charity. If the Commissioners refuse to authorise proceedings, a judge of the Chancery Division may do so. No authority is required for the taking of proceedings in a pending cause or matter or for the bringing of any appeal or for the taking of proceedings by the Attorney-General.

(f) *Power of the Attorney-General to petition for the winding up of charitable companies*

Section 30, which is new, enables the Attorney-General to petition for the winding up of charitable companies, and prevents a charitable corporation, which alters its objects and thereby ceases to be charitable, from applying for its new objects property previously held for its charitable purposes.

5. *The enactment of clear provisions restricting dealings with charity property*

Hitherto, section 29 of the Charitable Trusts Amendment Act, 1855, prohibited the sale, mortgage or lease (with certain exceptions) of charity property without the consent of the Charity Commissioners or under the authority of an Act of Parliament or a court of competent jurisdiction, notwithstanding that the trust instrument purported to authorise the dealing in question.

Certain institutions were exempted *nominatim* from these restrictions; but in other cases exemption depended on the nature of the charity concerned. Broadly speaking, charities were divided into three classes—plain, endowed and mixed; but the lines of demarcation between them were somewhat blurred.

A plain charity was one wholly maintained by voluntary subscriptions. It was entirely exempt from the Charitable Trusts Acts, and in particular, the consent of the Charity Commissioners was not required to any dealing with land purchased out of voluntary contributions.[35]

An endowed charity was one whose property consisted wholly of endowments. Endowment was widely defined in section 66 of the Charitable Trusts Act, 1853, to include property of every kind whatsoever " which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof." But this had to be read subject to section 62 of the Act which exempted from the jurisdiction of the Act " endowments " arising from voluntary subscriptions. Hence it was held that a gift did not amount to an endowment unless it was given subject to conditions preventing the institution from applying the capital of the fund towards its general purposes.[36]

[35] *Re Clergy Orphan Corporation* [1894] 3 Ch. 145.
[36] *Society for Training Teachers of the Deaf and Whittle's Contract* [1907] 2 Ch. 486.

A mixed charity was one maintained partly by voluntary subscriptions and partly by income received from any "endowment." The restrictions in the Act only applied to the income from endowment and not to voluntary subscriptions and their application. Moreover, donations to mixed charities in respect of which no special appropriation was directed by the donor, and which were lawfully applicable by the mixed charity as income in aid of the voluntary subscriptions, were exempted.[37] It made no difference to the exemption that the donations were invested,[38] provided that (i) at the time of the donation the charity was already a mixed charity [39] and (ii) the investment was not made on terms restricting the charity from using the invested fund as income.[40] Although this much was clear, it was often a matter of great difficulty to determine whether land belonging to a mixed charity could be dealt with without the consent of the Commissioners.[41]

Section 29 of the Act, which replaces the previous restrictions, renders the classification of charities as plain, endowed or mixed, unnecessary. Subsection (1) provides that no property forming part of the permanent endowment [42] of a charity shall, without an order of the court or the Commissioners, be mortgaged or charged by way of security for the repayment of money borrowed, nor, in the case of land in England or Wales, be sold, leased or otherwise disposed of. It will thus be seen that the restrictions on mortgaging or charging apply to all property forming part of the permanent endowment of charity; and that the restrictions on selling, leasing or otherwise disposing of land apply whether the land forms part of the permanent endowment or not. Indeed, where land does not form part of the permanent endowment of a charity, but is or has at any time been occupied for the purposes of the charity, subsection (2) makes it clear that the restrictions apply; subject, however, to a proviso validating transactions entered into without an order of the court or the Commissioners "in favour of a person who (then or afterwards) in good faith acquires an interest in or charge on the land for money or money's worth." Subsections (3) and (4) remove the restrictions in the case of (i) transactions authorised by or having affect under an Act of Parliament or a legally established scheme; (ii) the grant of a lease for a term ending not more than twenty-two years after it is granted, not being a lease granted wholly or partly in consideration of a fine; (iii) the disposition of an advowson; and (iv) exempt and excepted charities.

37 *Re Sons of the Clergy Corporation and Skinner* [1893] 1 Ch. 178.
38 *Re Clergy Orphan Corporation* [1894] 3 Ch. 145.
39 *Villiers* v. *Att.-Gen.* [1922] 1 Ch. 394.
40 *Att.-Gen.* v. *Mathieson* [1907] 2 Ch. 383.
41 See A. H. Withers, *Sales of Land of Mixed Charities* (1946) 10 Conv.(N.S.) 72.
42 Defined in s. 45 (3) as property held subject to a restriction on its being expended without distinction between capital and income. See note 34, *supra*.

6. *The repeal of the law of mortmain*

The previous law of Mortmain and Charitable Uses was contained in the Mortmain and Charitable Uses Act, 1888, and amending Acts of 1891 and 1892. The effect of Part I of the Act of 1888 was to prohibit the acquisition of land by a corporation in mortmain, except under licence from the Crown or under statute; but as a result of a large number of statutory exemptions, of haphazard and illogical growth, the requirement of a licence had become the exception rather than the rule.

The previous law relating to assurances of land for charitable uses was contained in Parts II and III of the Act of 1888, the amending Acts of 1891 and 1892, and section 29 (4) of the Settled Land Act, 1925.

The effect of Part II of the Act of 1888 was to require: (i) that assurances of land for charitable uses must be made by *deed* executed before two witnesses and enrolled; (ii) that they must take effect at once and without power of revocation or reservation for the benefit of the assuror; and (iii) that they must be made at least twelve months before the death of the assuror, unless made for valuable consideration.

The effect of the Act of 1891 was to restore the power of testators to leave land to charity *by will*; but the land had to be sold within one year of the testator's death unless the court or the Commissioners extended the period or authorised the retention of the land. Moreover, a testamentary gift of personalty to charity with a direction to purchase land was valid, but the direction could not be complied with.

The effect of section 29 (4) of the Settled Land Act, 1925, in so far as it re-enacted Part IV of the Act of 1888, was to exempt a registered disposition of registered land from the requirement of execution before two witnesses and of enrolment; and, in so far as it applied to unregistered assurances of unregistered land or of personal estate to be laid out in the purchase of land, to substitute for execution before two witnesses and enrolment an obligation to send the assurance or a copy to the Commissioners. Moreover, section 87 of the Education Act, 1944, required copies of assurances of land to charity for educational purposes to be sent to the Minister of Education within six months of their execution.[43] Failure to comply with these requirements rendered the assurance void.

Part III of the Act of 1888, the amending Act of 1892 and many statutes concerned with education, health, housing and other matters, created numerous exceptions with no underlying connection between them. The Nathan Committee accordingly recommended the repeal of the law of mortmain and charitable uses (so

[43] Universities, though generally exempt from the Charitable Trusts Act, jurisdiction, were nevertheless subject to this requirement: *Re 12 Regent Street Oxford* [1948] Ch. 375.

far as it related to charity) which they characterised as "an anachronism in the conditions of the twentieth century." [44]

Section 38 (1) of the Act gives effect to the Committee's recommendation,[45] by repealing the whole of the law of mortmain and charitable uses. Section 38 (2) validates assurances of land which had been rendered void for failure to comply with the requirements of the previous law, where no steps had been taken to assert a claim on grounds of non-compliance, but it also preserves the rights of persons who had acquired title by adverse possession of land which had previously been assured to charity under an assurance previously void, but now validated. Section 38 (3) deals with the case of a testamentary direction to lay out personalty in the purchase of land. As already seen, such a direction was previously disregarded. It is to remain so only in respect of testators who died before the Charities Act came into force. It also deals with the requirement to sell land comprised in a devise to charity before the Act came into force. Under the previous law, the land had to be sold within a year of the testator's death. That requirement is now abrogated both in respect of future devises and in respect of land still unsold when the Act came into force.

7. *The addition of a class of* EXCEPTED *charities to the already existing class of* EXEMPT *charities*

Under the previous law a number of charities were exempt from the powers and jurisdiction under the Charitable Trusts Acts of the Commissioners and the Minister. Generally speaking the list of exempt charities, which is contained in Schedule II of the Act, remains the same as under the previous law, and includes, *inter alia*, the Universities and Colleges of Oxford, Cambridge and Durham, the University of London, the Colleges of Winchester and Eton; any other universities or university colleges declared by Order in Council to be exempt charities; the British Museum; the Church Commissioners, and registered societies within the meaning of the Industrial and Provident Societies Act, 1893, or the Friendly Societies Act, 1896.

Exempt charities are not subject to the supervisory and inquisitorial jurisdiction of the Commissioners or the Minister, and are automatically exempt from the following provisions of the Act: section 4 (registration); section 6 (inquiries); section 7 (supply of documents to Commissioners); section 8 (submission of accounts and audit); sections 10, 11 and 12 [46] (local authority's index; reviews by local authority; and co-operation between charities and

[44] *Loc. cit.* para. 276.

[45] In some respects the Act goes further since the repeal of the law of mortmain frees all corporations (whether charitable or not) from the previous restrictions.

[46] All the exempt charities are "national" rather than "local" in character. Apart from this, the local authority index is little more than a duplicate of the central register, which does not cover exempt charities.

between charities and local authorities); sections 18 (6) and 19 (6) (jurisdiction of the Commissioners to apply to the Home Secretary for a case to be referred to them with a view to establishing a scheme); section 19 (7) (prohibiting the costs of promoting Bills in Parliament from coming out of charity funds); section 20 (power of Commissioners to act for protection of charities); section 28 (2) (prohibition against bringing proceedings without order of the Commissioners); and section 29 (restrictions on dealings with property).

Excepted charities, on the other hand, can be excepted by order or regulations from any or all of the following three provisions only: section 4 (registration); section 8 (submission of accounts); and section 29 (restrictions on dealings with property).

O. R. Marshall.*

* Professor of Law in the University of Sheffield.

THE CONFLICT OF LAWS AND THE ENGLISH FATAL ACCIDENTS ACTS

English courts have not frequently been confronted with suits for damages for wrongful death in which foreign elements are apparent. Consequently, the textbooks have accorded very little attention to the matter,[1] and it therefore seems that a short analysis of the situation would not be out of place—especially since the recent decision of Paull J. in *Schneider* v. *Eisovitch* [2] tends to emphasise the problem.

Section 1 of the Fatal Accidents Act, 1846, reads as follows:

> " Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

It would appear that the following " permutations " are capable of occurring:

(a) *Situations where the wrongful act, neglect or default and the resultant death occur outside England*

In *Davidsson* v. *Hill*,[3] a decision with which it is difficult to quarrel, a collision occurred on the high seas between a British ship and a Norwegian barque owing entirely to the negligence of those in charge of the British vessel. As a result of the collision, a sail-maker aboard the Norwegian ship was drowned. He was a Norwegian subject who had his home with his family in Norway. His widow sued in England (there being no personal representative of the deceased in England) on her own behalf and that of their six children to recover compensation from the English owners of the British ship for her husband's death under the Fatal Accidents Acts, 1846–1908. Kennedy and Phillimore JJ. dismissed the contention for the defendants that those Acts applied only to British subjects and others, of whatever nationality, who were actually

1 Cheshire, *Private International Law* (5th ed., 1957), and Graveson, *The Conflict of Laws* (4th ed., 1960), are all but silent on the topic. See Dicey, *Conflict of Laws* (7th ed., 1958), pp. 954–959.

2 [1960] 1 All E.R. 169, noted as to the very interesting domestic law points in the case by Dworkin (1960) 23 M.L.R. 317. See, however, *Gage* v. *King* [1960] 3 W.L.R. 460.

3 [1901] 2 K.B. 606.

within the territorial jurisdiction of the British Crown [4] and held that the widow had a right of action under the Acts against the shipowners. It was thought that it would be ridiculous to hold that the deceased's foreign nationality should operate as a bar to any of the deceased's family under the Act when, had the deceased been merely injured and not drowned, he could have brought an action for negligence in the English courts against the shipowners —assuming, of course, that they were subject to the jurisdiction of those courts. Kennedy J. also thought that, had both parties been foreigners, an action (assuming the court to have jurisdiction) would have lain [5] and perhaps also if the wrongdoers had been foreigners and the deceased English.[6] He also considered that the *lex loci* was either English domestic law (on the basis that the tort had been committed on the British ship) or the English law maritime. Phillimore J. considered either English maritime law or Norwegian domestic law (as the law of the foreign ship) to be the *lex loci*.

In *Finnegan* v. *Cementation Co. Ltd.*[7] a workman employed by the defendants died [8] six days after incurring injuries in an accident in the course of his employment in the Republic of Ireland. His widow obtained a grant of representation to his estate in the Republic but failed to take out an English grant. Nevertheless, she sued the defendants in England as widow and administratrix to recover damages for herself and the other dependants of the deceased under the English Fatal Accidents Acts. The Court of Appeal held, though with regret, that the widow could not be regarded as " administratrix " in England for the purposes of the Fatal Accidents Acts inasmuch as she had no English grant; that, having brought her action in a representative capacity which she had not in fact got, the first instance judge and the master had been right in setting the action aside, and that the prevailing limitation period of twelve months having elapsed she could not raise a fresh action in her capacity merely as widow. What is striking, however,

[4] A contention based on the decision of Darling J. in *Adam* v. *British and Foreign Steamship Co.* [1898] 2 Q.B. 430.

[5] [1901] 2 K.B. at pp. 610, 615.

[6] [1901] 2 K.B. at p. 615. Kennedy J. (*ibid.*) pointed out that had the plaintiff not the right to enforce her claim against an English subject, the anomaly would result that if a foreigner and an Englishman serving in the same ship were both drowned on the high seas in the same collision negligently caused by an English vessel, the widow of the one could, and the widow of the other could not, bring an action under the English Acts. Phillimore J. (at p. 619) said: " If an Englishman on board a foreign ship, or a foreigner on board a British ship, is run down by a British ship upon the high seas, it seems almost certain that an action would lie."

In view of the *reductio ad absurdum* of Kennedy J. it is difficult to see how the nationality or residence either of the deceased or the plaintiff can prevent a cause of action arising under the English Acts. One trusts also that if such an action were denied by the *lex ultimi domicilii* of the deceased no English court would follow *Lister* v. *M'Anulty* [1944] 3 D.L.R. 673 (Canadian Supreme Court) and strike out the claim on that account alone.

[7] [1953] 1 Q.B. 688 (C.A.).

[8] It is not expressly stated where the deceased died, but it would seem to be a legitimate inference that he died in the Irish Republic.

about this case is that no objection seems to have been taken either by counsel for the defence or by the court to the founding of the plaintiff's claim on the English Fatal Accidents Acts. If the gist of fatal accidents actions is the " wrongful act, neglect or default " (which the writer respectfully submits to be so), then surely it was the Irish fatal accidents provisions which should have formed the basis of the claim.

It may further be noted that in *Walpole* v. *Canadian Northern Ry.*[9] the injury and resultant death occurred in British Columbia, but the plaintiff widow (the appellant) sued in Saskatchewan under the Fatal Accidents Act of the latter Province. Readers will not require to be reminded why the Privy Council found for the defendant company (the respondent), but it is to be remarked that the Board did not fully discuss, and therefore expressed no opinion upon, the respondent company's contention that the Saskatchewan fatal accidents legislation was confined " to cases of negligence occurring within that Province." [10] In the earlier Privy Council case, *Canadian Pacific Ry.* v. *Parent*,[11] the injury and resultant death occurred in Ontario, but the plaintiff widow (the respondent) sued in Quebec under the fatal accidents provisions of that Province. It is well known that the Board found for the defendant company (the appellant), but it is sometimes forgotten that the Board also gave it as its opinion that the Quebec fatal accidents provisions were meant " to confine the special remedy conferred to cases of offences or quasi-offences committed within its own jurisdiction." [12]

Such, then, was the state of the authorities when Paull J. was confronted with *Schneider* v. *Eisovitch*.[13] It will be recalled that the plaintiff widow brought a consolidated action to recover damages as follows: (i) in her capacity as the personal representative of her deceased husband, under the Fatal Accidents Acts, in respect of his death—which had occurred, it will be remembered, in France owing to the defendant's negligent driving in France of the car in which the plaintiff and her husband were riding as passengers; (ii) £110, being the sum which she had promised to pay to certain relatives who had come to France unrequested to the plaintiff's assistance; and (iii) in her own right, for nervous shock. Prophesying the very facts of this case, Dicey states: " if a United Kingdom citizen domiciled and resident in England causes an

9 [1923] A.C. 113 (P.C.).

10 [1923] A.C. at p. 119, *per* Viscount Cave.

11 [1917] A.C. 195.

12 [1917] A.C. at p. 206, *per* Viscount Haldane. It will be recalled that in *M'Elroy* v. *M'Alister*, 1949 S.C. 110, one of the pursuer's claims in the Scots court was for damages under the English Fatal Accidents Acts in respect of her husband's death in England caused by the defendant's negligence in England. The claim failed, not because her action was wrongly based on the English statutes, but because she had lost her right of action thereunder by virtue of the passage of the then prevailing limitation period of twelve months.

13 *Supra*.

accident while driving a car in France, he is, in general, liable for the consequences only if and in so far as he is liable according to French law." [14] It is also stated by Dicey that " where the *lex loci delicti* refuses to recognise a head of damage or a causal connection which English law would have recognised, the court will, it is submitted, give effect to that law." [15] One does not wonder at the plaintiff's success in recovering under head (ii), for this seems to have been treated simply—and rightly so in view of *Kohnke* v. *Karger* [16]—as an item of general damages and thus assessable according to the law of England as *lex fori*. As regards heads (i) and (iii), however, French law was not consulted, and no precedents on the conflict of laws were taken into consideration. In all fairness, though, it must be stated that the defendant had admitted liability and this may well explain (though, it is respectfully submitted, it should not) how the widow's claim (i)—for " loss of her breadwinner "—came to be based on the English law and not upon the French; how it was never discussed whether French law gives any right of action to a widow (or to someone on her behalf) for " loss of her breadwinner " and how it was never required of the plaintiff to show that the defendant's conduct was wrongful according to French law.[17] It may also explain how, in connection with claim (iii), French law was not looked to in order to discover whether nervous shock was an admissible head of damage. One would also have thought that the questions of remoteness should have been referable to French law as the *lex loci delicti*.

The *Finnegan* [18] case and *Schneider* v. *Eisovitch* [19] thus leave one with the impression that they run counter, at any rate at first sight, to the statement of Willes J. that " the civil liability arising out of a wrong derives its birth from the law of the place [where it is done], and its character is determined by that law." [20] They imply also that the Fatal Accidents Acts, 1846–1959, may be accorded the widest possible extraterritorial operation. Further, they indicate that a plaintiff suing in England may properly frame his or her claim in respect of a tort committed abroad as though the tort had been committed in England—thus using the English forms of action—and may leave it to the defendant, if he can, to show that his conduct was " justifiable " according to the *lex loci delicti* or that that law gave the plaintiff no *jus actionis*.

On the other hand, the position in the two cases is susceptible to the following explanation: that Irish and French law were presumed to be the same as the English statute law and thus

[14] Dicey, *op. cit.*, p. 935.
[15] Dicey, *op. cit.*, p. 964.
[16] [1951] 2 K.B. 670.
[17] See further on these questions, Dicey, *op. cit.*, pp. 965–966; Amos & Walton, *Introduction to French Law* (1935), pp. 217–219.
[18] *Supra.*
[19] *Supra.*
[20] In *Phillips* v. *Eyre* (1870) L.R. 6 Q.B. 1 at p. 28 (Exch.Ch.).

presumed to " coexist " (to use the language of the majority of the Australian High Court in *Koop* v. *Bebb* [21]) in giving the widows a right of action against the defendants for causing the deaths of their husbands.

(b) *Situations where the wrongful act, neglect or default* and *the resultant death both occur in England*

Here, of course, no conflict situation arises and no discussion is called for.

(c) *Situations where the wrongful act, neglect or default occurs in England* but *the resultant death occurs abroad*

The writer knows of no reported case where an English court was faced with such a set of facts. If it be accepted that the gist of the action is the wrongful conduct in England, then again no conflict situation arises and no discussion is called for. As in (b), the action will be properly founded on the English Acts.

(d) *Situations where the wrongful act, neglect or default occurs abroad* but *the resultant death occurs in England*

Again, there seems to be no English case on this permutation of facts, but, in *Koop* v. *Bebb*,[22] a majority of the Australian High Court held that, where the deceased was negligently injured in New South Wales and died as a result of his injuries in Victoria, an action by his dependent children was well founded in the Victorian courts under the fatal accidents provisions of the forum, *i.e.*, of Victoria. From this it would follow that an action would be properly based on the English Acts in situation (d) above. McTiernan J., however, considered that the *locus delicti* was in New South Wales and that the action in the Victorian courts ought therefore to be based on the New South Wales fatal accidents provisions.[23] It is respectfully submitted that the latter view is correct

21 (1951) 84 C.L.R. 629 at p. 644. See for further discussion on this case, Fleming (1952) 1 I.C.L.Q. 262; Cowen, *loc cit.*, p. 561, and Cowen (1952) 68 L.Q.R. 321, all of which are valuable notes.

In *Purdom* v. *Pavey* (1896) 26 S.C.R. 412, the Canadian Supreme Court refused to assume that the law of Oregon (the *lex situs* of the land in question) concerning mortgages was the same as the Ontario statute law, Ontario being the Province in which the action was brought. Further, it may be noted, with regard to *Schneider* v. *Eisovitch*, that France is a civil law country and not a common law country. Perhaps Paull J. felt able to consider that: " It may be that in . . . questions of broad principles of jurisprudence or commercial morality, the probability is that the law in foreign countries will be the same as our own, and the presumption may arise " (*per* Gardiner J. in *Schnaider* v. *Jaffe* (1916) 7 C.P.D. 696 at p. 699). *Cf. Guépratte* v. *Young* (1851) 4 De G. & Sm. 217.

22 *Supra.*

23 At pp. 647–649. He is obviously much influenced by the decision of the English Court of Appeal in *George Monro, Ltd.* v. *American Cyanamid and Chemical Corporation* [1944] K.B. 432. That case is concerned with the *locus delicti* for the purposes of R.S.C., Ord. 11, r. 1 (*ee*), and not for the purposes of

and therefore that the actions both in the *Finnegan* [24] case and in *Schneider* v. *Eisovitch* [25] were incorrectly based upon the English Fatal Accidents Acts. Similarly, it ought to follow that an action in situation (d) above must be based on the foreign fatal accidents provisions. Moreover, as Professor Hancock has pointed out, when American states began to enact fatal accidents legislation, many attempts were made to persuade courts to accord them extra-territorial operation and that these attempts were " uniformly unsuccessful." [26]

It is, despite what has been said above, perfectly possible to put forward a fair argument that a claim for " loss of a breadwinner "

the second limb of the rule in *Phillips* v. *Eyre*. There is, it is submitted, no reason why the rules for determining the *locus delicti* should differ according to the purpose for which it is intended to apply the answer. See also Goodrich, *Conflict of Laws* (2nd ed., 1949), at p. 264, where it is pointed out that the weight of American authority is that the law of the place of injury and not the place of the ensuing death is the law under which the right of recovery is to be had, though the death of the injured person is a condition precedent to the accrual of the right.

[24] *Supra*.

[25] *Supra*.

[26] *Torts in the Conflict of Laws* (1942), pp. 23–24. On p. 24 he cites *Whitford* v. *Panama, etc., Ry.* 23 N.Y. 465 (1861), to emphasise his point: an action was brought by an administrator to recover damages in respect of the death of the deceased while a passenger in one of the defendants' trains in New Granada. The action was based on the New York wrongful death statute but the New York Court of Appeals refused to allow recovery thereunder, holding that the law of New Granada governed. Counsel for the appellants in *Koop* v. *Bebb* (1951) 84 C.L.R. at pp. 634–635 described the case as one decided before the nature of the cause of action under the Acts was as well settled as now and as unconvincing because it does not appreciate that the legislation was providing for an event within the state (*i.e.*, extinction by death of a cause of action within the state), and proceeded upon the false premise that the deceased's own action would be an action under foreign law and not the local law.

The American practice is still to base the claim on the wrongful death statute of the *locus delicti* and not that of the forum as the following later cases show: *Powell* v. *Great Northern Ry.* 102 Minn. 448; 113 N.W. 1017 (1907): the plaintiff sued in Minnesota under the wrongful death statute of N. Dakota and was awarded $11,000; defendant appealed from order denying its motion for a new trial, claiming it to be contrary to Minnesota policy to allow recovery of more than $5,000, the limit set by the Minnesota statute. The order was affirmed on the ground that the statute of the forum had nothing to do with damages. *Cf. Story* v. *Stratford Mill Co.* (1913) 11 D.L.R. 49; 30 Ont.L.R. 271; *Usher* v. *West Jersey Ry.* 126 Pa. 206; 17 A. 597 (1889), plaintiff sued in Pennsylvania under wrongful death statute of New Jersey in respect of her husband's injury and death in the latter state; that statute required the personal representative to sue. Holding that the widow could not sue in her own right, Mitchell J. of the Supreme Court remarked: " . . . as the occurrence out of which, if at all, the right must arise, took place in New Jersey, it is to the statutes of that state alone that we must resort to ascertain the nature of the right, and the party in whom it is vested. . . . " See, too, *Centofanti* v. *Pennsylvania Ry.* 244 Pa. 255; 90 A. 558 (1914), *Loucks* v. *Standard Oil Co. of New York* 224 N.Y. 99; 120 N.E. 198 (1918), and *cf. Walton* v. *Arabian American Oil Co.* 233 F. 2d 941 (1956). It necessarily follows from the American rules set out above and in note 23, *supra*, that if the *lex loci* contains no wrongful death provisions at all, it is useless to base an action on the wrongful death statute of the forum. *Semble*, therefore, one might argue that the rule in *Phillips* v. *Eyre* should not permit a plaintiff to recover under the English Acts if the *lex loci* contains no similar provisions: *sed quaere*. See, too, Leflar, *Conflict of Laws* (1959), pp. 210–213; 219–223.

before the English courts should be based on the English Acts whatever foreign elements are present. It could, for instance, be argued that, in view of *Machado* v. *Fontes*,[27] once it is established that, had the relevant operative facts occurred in England, they would have constituted a tort against the deceased according to English law and that there is no " justification " by *lex loci*, it is English law which must be relied upon because it is that law which confers on the plaintiff not only the remedy but also the right of action. In other words, the Fatal Accidents Acts must be regarded as remedial or procedural and thus as conferring on a proper plaintiff a transitory right to claim damages in respect of an " unjustifiable " wrongful act, neglect or default—*wherever committed against the deceased*—so long as the latter's death consequent thereon ensues somewhere. This view is, of course, quite consonant with that taken in *The Vera Cruz*,[28] *viz.*, that the Acts confer a completely new cause of action; on the other hand, it is not compatible with that expressed in *George Monro, Ltd.* v. *American Cyanamid and Chemical Corporation*.[29] Further, it could be argued that the Fatal Accidents Acts are to be taken as constituting part of the English law of administration of assets and thus that he or she who resorts to them resorts to them simply as forming part of the *lex fori* and is accordingly not concerned to base the action upon foreign law even if apparently relevant foreign points of contact are present. All these views are consistent with the majority statement in *Koop* v. *Bebb* [30] that " English law as the *lex fori* enforces an obligation of its own creation in respect of an act done in another country which would be a tort if done in England, but refrains from doing so unless the act has a particular character according to the *lex loci actus*." [30] There is no doubt that a requirement that the English Acts and not the foreign provisions must be relied on saves much trouble: for instance, the question of who is the proper plaintiff will be governed by English law alone, so that there need be no concern to acquire that nice degree of learning on this aspect of the topic which is required of American practitioners [31]; on the other hand, reliance on the English Acts necessitates a somewhat complicated comparison between the English and the relevant foreign fatal accidents provisions similar to that made by the Court of Appeal in *Travers* v. *Holley* [32] between section 18 (1) (*a*) of the English Matrimonial Causes Act, 1950, and the corresponding New South Wales legislation. Such then, are the somewhat onerous legacies of *Phillips* v. *Eyre*.[33]

27 [1897] 2 Q.B. 231 (C.A.).
28 (1884) 10 App.Cas. 59 (H.L.). And see Street, *Law of Torts* (2nd ed., 1959), pp. 421–422.
29 *Supra*.
30 (1951) 84 C.L.R. at p. 644.
31 See Goodrich, *op. cit.*, pp. 298–301; Hancock, *op. cit.*, pp. 126–131.
32 [1953] P. 253 (C.A.).
33 *Supra*.

However, there is no doubt that, whatever may be the correct solution to the problems posed here, those who welcome the application whenever possible of the *lex fori* have due cause to rejoice in the decision in *Schneider* v. *Eisovitch*.[34] And those who would like to see the emergence of a theory of a proper law [35] of a tort will also acclaim the fact that the court treated the case just as though the accident had occurred, and the husband's consequent death had ensued, in Brighton, where the Schneiders' matrimonial home was.[36] Certainly the decision is much more reassuring to adherents of a proper law theory than was *Szalatnay-Stacho* v. *Fink*.[37]

P. R. H. Webb.*

[34] *Supra.*

[35] See Morris (1948) 12 M.L.R. 248; Dicey *op. cit.*, p. 937 *et seq.*

[36] The net result of the case is that English law was effectively chosen as the proper law of the tort. It is strange how the conflictual aspects of a case can come to be overlooked. It is equally strange that, although no issue of jurisdiction or choice of law is raised by the pleadings in a case, the conflict of laws is nevertheless discussed: see, *e.g.*, *Parojcic* v. *Parojcic* [1959] 1 All E.R. 1; Webb (1959) 22 M.L.R. 198; in which all possible connecting factors showed that the English court had jurisdiction and ought to apply English domestic law and yet there was no small discussion of conflict topics in the course of the judgment.

[37] [1947] K.B. 1 (C.A.).

* Lecturer in Law in the University of Nottingham.

KNOWING THE LAW

It is now twenty-one years since the question of law reporting was last officially considered,[1] but recently the subject has again engaged some public attention, with particular reference to unreported decisions of the Court of Appeal.

In 1940, the majority of members of the Law Reporting Committee recommended no major changes in the then system (or lack of system) of law reporting. In a dissentient report, however, Professor Goodhart (as he then was) recommended: " that official shorthand writers should be attached to all courts of record to take and transcribe all judgments. The transcripts should then be sent to the judges for such revision as they might consider it desirable to make in them. After a reasonably short period, not exceeding if possible a week, these transcripts would be returned to a central office at the Law Courts, where copies could be obtained by the reporters and by any other persons on payment of a fee. All judgments would be filed in the central office, and would be indexed by an official specially appointed for this purpose." [2] To this suggestion the majority of the Committee objected on the three grounds that the scheme proposed: (1) would involve a charge upon the public funds, (2) would impose an additional burden on the judges, and (3) offered what some members thought no real advantage and others a grave disadvantage in having a permanent record of all judgments. Under this head of objection the Committee committed itself to the view that " In the numerous reports, general and special, almost every decision of any possible importance to the body of English law will be found. What remains is less likely to be a treasure-house than a rubbish heap in which a jewel will rarely, if ever, be discovered."

Professor Goodhart countered the first objection by pointing out that no evidence was taken by the Committee as to what the cost of his suggested scheme would be, and in support of his view that no more than a nominal sum would be involved, he referred to the evidence of a witness that the cost of transcripts was only a " minor item " in the cost of issuing law reports. As to the additional burden on the judges, Professor Goodhart pointed out that the burden of revising the judgments would be considerably less if the transcripts were delivered to the judges promptly, and he quoted one of the judges as saying: " It is a very simple matter to revise a proof within a few days of delivering a judgment; it is much more difficult to do it weeks later, when the details of the case are not fresh in

1 By the Law Reporting Committee appointed early in 1939. Their Report was issued by the Lord Chancellor's Department in March 1940.

2 Dissentient Report, *ibid.* p. 25.

one's mind (or, as is perhaps more important, in the mind of the shorthand-writer) and the documents referred to have been returned to the solicitors." Professor Goodhart also pointed out that since it is the accepted duty of the judges to declare the law, it is reasonable to ask them to ensure that the law they declare is accurately recorded. The Committee's third objection, to the effect that all reportable decisions are in fact reported, is sufficiently belied by subsequent recorded complaints of inadequate reports,[3] which most practitioners and law teachers could supplement.[4]

Since 1940 some changes have taken place. In particular, at the beginning of 1953 the *Times Law Reports* and the *Weekly Notes* were merged into the *Weekly Law Reports*, and it is understood that both for this series and the *All England Reports* the reports are now corrected by the judges before publication. These are now the only series of general reports, and so long as the choice of cases for reporting remains in the hands of reporters or individual editors it is to be hoped that no one series will acquire a monopoly of law reporting. In 1951 the decision was taken to preserve a transcript of all decisions of the Court of Appeal, as to which more will be said later. Nevertheless, complaints of inadequate reporting continue. One of the advantages which Professor Goodhart foresaw for his scheme was that it would at least allow the editors of the various series of reports to decide which cases to include in the *Law Reports* after seeing the transcripts, instead of "relying almost entirely on the opinion of the reporters whether a case ought to be reported or not. If the latter make an error there is no proper check." No such reform has taken place. There are still too few reporters and by and large it is they who decide whether a case shall be reported or not, and that usually before the case has been heard. Counsel may be asked, before the hearing starts, whether a case is worth reporting. Not uncommonly the only possible reply is "it depends on how it goes," but frequently if the case takes an unexpected turn in which a novel point arises for decision no reporter is available.

Even if proper reports or transcripts were available of all cases,

[3] *e.g.*, *Morley* v. *Morley* [1961] 1 W.L.R. 211, in which the Divisional Court had to consider the decision of the Court of Appeal in *Baguley* v. *Baguley* (1957) of which the only report was a note in *The Times*, October 9, 1957. See also (1949) 65 L.Q.R. pp. 154–157; R. E. Megarry on "Reporting the Unreported" in (1954) 70 L.Q.R. p. 246; Sir C. K. Allen, *Law in the Making*, 6th ed., pp. 350–362.

[4] The field of family law is particularly badly served by the reporters. Thus to take a few examples at random, on property, *Birkett* v. *Birkett* (1908) is inadequately reported in 24 T.L.R. 284 and rather better at 98 L.T. 540; neither this case nor *Blackwell* v. *Blackwell* [1943] 2 All E.R. 579 was included in the *Law Reports*. Of *Hislop* v. *Hislop* [1950] W.N. 124, an important decision in the Court of Appeal, there is only an utterly inadequate note in the old *Weekly Notes*; *Newgrosh* v. *Newgrosh* (1950) C.A., appeared only in 100 L.J. 525. On the question whether an unmarried mother may adopt her illegitimate child, the best the reporters could do for *Re S*, heard in the Court of Appeal on February 8, 1957, was a note at the end of another report on the same question in [1959] 2 W.L.R. 30; [1959] 1 Q.B. 233.

it seems very doubtful if the final decision on whether a case is reportable should lie with an editor responsible to no one but those who employ him. Surely this is pre-eminently a decision to be taken by a committee, which should have the fullest information about all cases decided, and should not be drawn exclusively from practising members of the Bar. Solicitors, law teachers and magistrates should obviously be represented, and in the field of family law (which suffers greatly from meagre reporting),[5] there is also a case for representation of the social services to counterbalance the excessive stress on the types of litigation most profitable to the legal profession.

The *Weekly Law Reports* has adopted the suggestion put forward by Professor Goodhart in 1940, of dividing the reports into two parts, of which the second only is intended for incorporation in the *Law Reports*, but too few decisions are still reported and sometimes they are still very late.[6]

Some idea of the number of unreported cases may be gathered from the fact that since 1951, when the practice of keeping transcripts of unreported decisions in the Court of Appeal was instituted, there has been an average of about 380 such decisions every year.[7] It would perhaps seem unbelievable to anyone but an English lawyer that until 1951 no record whatsoever was kept of any decisions of the Court of Appeal that did not find their way into any of the various series of reports. But of course such decisions could always be cited by any member of the Bar who happened to have heard them, or had been requested by his clients to record them for their benefit. When so cited they were binding. When this happened, justice was manifestly seen not to be done to the other side in the subsequent litigation. Even now that transcripts are kept, they include no record of the arguments of counsel (which by an unfortunate tradition now set the bounds for the court's decision [8]) and the statement of facts is rarely adequate.

Even more unfortunate, however, are the administrative provisions made with respect to these transcripts of unreported decisions of the Court of Appeal. In the first place they have been housed in the Bar Library, to which only members of the Bar normally have access. (In *Morley* v. *Morley* [9] the Divisional Court announced that

[5] See note 4, *supra*.

[6] When the new *Weekly Law Reports* were introduced, the publishers announced that they hoped to bring out reports of all publishable cases "within about three weeks of judgment." The issue of April 28, 1961, contains a report of *The Soya Margareta* [1961] 1 W.L.R. 709, last heard by Hewson J. on May 30, 1960, and *Slater* v. *Slater* [1961] 2 W.L.R. 685, last heard by the Court of Appeal on July 20, 1960. The issue of May 5, 1961, contains a report of *The Beaverford* [1961] 1 W.L.R. 793, heard by Hewson J. on October 24, 1960. The choice between those cases for inclusion in the *Law Reports* and those included only in Part 1 of the *Weekly Law Reports* can only be described as eccentric.

[7] See *Law Society's Gazette* for May 1960, p. 345.

[8] See Professor F. H. Lawson, "The Academic Lawyer as Jurist," *Journal of the Society of Public Teachers of Law*, Vol. V, No. 4, December 1960, p. 183.

[9] [1961] 1 W.L.R. 211.

it had, for the purposes of the case, obtained from the Bar Library the only copy of the Court of Appeal decision in *Baguley* v. *Baguley*.[10] As a result of representations made by the Joint Committee of the Law Society and the Bar Council, the Law Society announced [11] that the Committee of the Bar Library had agreed that solicitors " should be permitted " to see these transcripts in the Bar Library, but this " permission " has been hedged about with so many caveats and conditions that protests have been made about the arrangements by two Professors of Law in the University of London who are also solicitors.[12]

In the first place the Committee of the Bar Library has announced that it is assumed that the use of the Bar Library by solicitors for the purpose of consulting the transcripts " would not in practice be more extensive than the staff and space of the library could accommodate," and that the proposed " privilege " must therefore in the first instance be for a reasonable trial period and be subject to the following conditions:

(1) The facilities will be extended only to solicitors who are members of the Law Society and who wish to see the transcripts for the purposes only of particular transactions in which they are engaged, or for advising particular clients in regard to actual or contemplated litigation.

(2) A solicitor must first obtain a card of introduction from the Law Society's Librarian which he will be required to produce to the Librarian of the Bar Library.

Finally the Bar Library announces that copies of the transcripts may be obtained from the Association of Official Shorthand Writers upon payment of the prescribed charge.

Confining the matter for the moment to the position of solicitors, it may be relevant to recall that in 1960 an Act was passed [13] increasing the number of judges of the High Court and the Court of Appeal to cope with the business to be done. When this is the line of development adopted in the public courts, it seems unfortunate that in the semi-privacy of the Bar Library there should be an attempt to confine the availability of the law to the premises and staff existing there at any particular moment.

Secondly it is surely very disturbing that the Committee of the Bar Library should consider consultation of the decisions of the court by officers of the court as a privilege to be extended by the Bar Library on conditions of its own devising, and with a veiled threat of withdrawal should it be inconvenienced by the arrangement.

Thirdly, as pointed out by the *Law Society's Gazette*,[14] these

[10] See note 3, *supra*.
[11] *Law Society's Gazette* for May 1960, p. 345.
[12] Professor L. C. B. Gower in *Law Society's Gazette* for July 1960 at p. 461 and Professor F. R. Crane, *ibid.* for September 1960 at p. 565.
[13] The Administration of Justice (Judges and Pensions) Act, 1960.
[14] *Law Society's Gazette* for May 1960, p. 345.

unreported decisions of the Court of Appeal have already been quoted by several textbook writers who are members of the Bar. The limitation of consultation by solicitors " for purposes only of particular transactions in which they are engaged, or for advising particular clients in regard to actual or contemplated litigation " has the effect of distinguishing against textbook writers who are not members of the Bar, and circumscribing knowledge of the law outside the members of the Bar within the narrowest possible limits of practice.[15]

But the effect of these restrictions extends beyond any question of gamesmanship, with whatever snobbish and unpleasant overtones may be present, between the two main branches of the profession. All who are interested in upholding the prestige of the law must surely defend the right of the layman to know and to read for himself, if he so wishes, the law by which he is governed. In most countries of Europe, the law has always been one of the great general schools for study in the universities. The President of the Society of Public Teachers of Law in 1960 [16] suggested that it was gradually assuming a similar importance in the universities of this country. No such development can take place if the committee of any library is in a position to refuse knowledge of the law to anybody not a member of the Bar, on the ground that it does not want him intruding on the library premises or bothering its staff. The Law Reporting Committee said in its Report in 1940 [17]: " . . . we have been impressed by the fact that a wider public is served by law reports and particularly by those of a special character. On the general principles of good reporting many patent cases, trade mark cases, tax cases and workmen's compensation cases contain little that is worth reporting. But for patent agents, for revenue officials, for those engaged in industry and trade union officials as well as for lawyers, whose duty it is to advise such persons, the special reports devoted to such subjects answer a real need." And if a report is

[15] The reference to the availability of copies of transcripts from the Association of Official Shorthand Writers is revealing. It is understood that those who, when consulting the transcripts of unreported decisions of the Court of Appeal, are seen to be making notes, are reminded that they must in no circumstances copy out the transcript verbatim, but must obtain a copy through the proper channel at the prescribed charge. The Law Reporting Committee considered that whether the ownership of a judgment lay in the judge under s. 5 (1) of the Copyright Act, 1911, or in the Crown under s. 18 of that Act, was " a purely academic question " since no judge was likely to assert his right. Since the Committee rejected the suggestion that any restriction should be placed on publication of reports, they dissented from any proposal to assert any right there might be in the Crown. A former law reporter has suggested that when the judge delivers an extempore judgment the copyright in it is that of the judge and the shorthand writer, and that this copyright is not infringed by the reporter because the judge and the shorthand writer consent to the law reporter's reports: C. G. Moran, *The Heralds of the Law* (1948), pp. 58–59. This claim of copyright in the shorthand writers seems worthy of further consideration, particularly if it can be asserted only because of the shortage of reporters.

[16] See note 8, *supra*.

[17] At p. 11, para. 13, of the Report.

omitted from the special reports, are such informed laymen to have no opportunity of consulting the transcript of the judgment, even of the Court of Appeal? The list of those non-lawyers who are interested in particular aspects of the law could, indeed, be greatly expanded. Teachers of law in the universities may spend a considerable part of their time teaching various aspects of the law to economists, accountants, political scientists, social workers, and students in various other disciplines, as well as the groups mentioned by the Law Reporting Committee. The importance of the informed layman in the working of the English legal system has always been recognised, and no narrow professional rivalries should be permitted to obscure it.

The fact that this note has concentrated on unreported decisions of the Court of Appeal, about which there has recently been public controversy, does not mean that this is the only area of reporting that requires examination. There are still unreported decisions of the House of Lords; there are certainly many imbedded in the special series of reports, which are frequently ignored in later cases. And what of decisions of the Divisional Court, which bind all magistrates' courts, not to mention the High Court itself?

Nor is the position in regard to legislation entirely satisfactory. Most legislation has been published at some time and is available in bound volumes of statutes in law libraries. In addition, many fairly recent statutes can be bought individually from H.M. Stationery Office at reasonable charges, but when these copies are out of print, the only alternative is a photostat copy. This, for example, is the only available individual copy of such statutes as the Wills Act, 1837, the Married Women's Property Act, 1882, the Guardianship of Infants Act, 1886, and the Custody of Infants Act, 1891. Only photostat copies of these statutes are available, at about 5s. to 6s. each. Such statutes as these affect very large numbers of people in their everyday lives. They and many others should always be available individually in print at reasonable charges.

We need not another Law Reporting Committee, but a new review of the whole question of how to get rid of difficulties in finding the law. This should be conducted by a law availability committee which should not be composed entirely of members of the Bar with a preponderance of judges and leaders, but should include a wide range of those who know from their experience the importance of having the law publicly known.[18]

O. M. Stone.*

[18] My thanks are due to my colleagues Mr. Aubrey Diamond, Mr. Gerald Dworkin, Professor L. C. B. Gower and Dr. Michael Mann for their helpful suggestions in connection with this article.
All errors of fact or opinion are of course my own.

* Lecturer in Law at the London School of Economics, University of London.

REPORTS OF COMMITTEES

Ninth Report of the Law Reform Committee (Liability in Tort between Husband and Wife)

In March 1959 the Lord Chancellor asked the Law Reform Committee " to consider whether any alterations are necessary or desirable in the law relating to the liability in tort of one spouse to the other." The Committee has now reported [1] that " section 12 of the Married Women's Property Act, 1882, should be repealed (except in relation to criminal proceedings) and that in the case of torts other than those affecting the title to or possession of property . . . husband and wife should be able to sue each other as if they were unmarried. The court should, however, be able, either of its own motion or on the application of the defendant, to stay the action if, having regard to all the circumstances including the conduct of the parties and the nature of the matter complained of, the judge is satisfied that the complaint is not one of substance or that it would not be in the best interests of the parties that the action should be allowed to proceed." [2] The Committee adds that it is not contemplated that the court would wish to stay the proceedings where the defendant appears to have a claim to indemnity or contribution from some other source, whether by means of insurance or otherwise, and points out that this is of particular importance in the field of personal injuries caused by negligence in the driving of a motor vehicle.[3] The power to stay should, however, be exercisable when torts are committed after the parties have ceased to cohabit as well as when they are committed during cohabitation, but it should apply only to actions brought during the subsistence of the marriage. The power to stay should apply also in the case of an antenuptial tort, although the committee considers it most unlikely that there would ever be occasion to stay proceedings in these circumstances.[4] Finally, the committee recommends that disputes affecting the title to or possession of property should continue to be dealt with under section 17 of the Married Women's Property Act, 1882, and says that the recommendation for the repeal of section 12 of that Act is made without prejudice to any right which a deserted wife may at present possess in the matrimonial home.[5]

1 Cmnd. 1268 published January 19, 1961.
2 *Ibid.*, paragraph 11.
3 *Ibid.*, paragraph 12. The Committee adds: " The inability of husband and wife to benefit from the other's insurance against third party risks has been the subject of much criticism in the memoranda we have received and we agree with the views expressed."
4 *Ibid.*, paragraph 13.
5 *Ibid.*, paragraph 15.

It is unnecessary to repeat here the injustices and anomalies which have arisen from the present rule that in general no action in tort will lie between a husband and wife, and the further anomalies introduced by the mitigation of the injustices on the wife's side, by permitting her to take action even against her husband for the protection of her property. The present position has frequently been the subject of criticism and is summarised in the Committee's Report. A full discussion of these and allied matters by Dr. Glanville Williams also appeared in this journal[6] at approximately the same time as the Committee's Report. In brief, the net effect is that, unjust as the rule may be as between husband and wife, " perhaps the injustices are even more glaring in their effect on other persons." [7] This is indeed but one illustration of a general principle applicable to the imposition of any dogma such as that of " unity of husband and wife," namely, that such a doctrine of unity between the members of any particular group must of necessity involve the erection of legal barriers between the members of that group and those outside it. Upon such a barrier both members of the group and third parties may come to grief.[8]

If the Report leads to early legislation no one will regret the passing of a doctrinal rule which has proved so unjust in practice. The power of the court to stay proceedings also seems reasonable, as family quarrels are pre-eminently suitable for the exercise of discretion, but only so long as the principles on which this discretion is exercised are made public and are reasonably in accord with enlightened public opinion. Thus in the first place it is to be hoped that the Committee's reservations as to when the power to stay should and should not be brought into play will be made sufficiently specific in any ensuing legislation. But in addition, and particularly since this power to stay is likely to be exercised by the masters in chambers and not by a judge in open court, it is very desirable that the principles on which it is exercisable should be very clearly laid down. The Law Reform Committee reinforce this point when they say that the procedure under section 17 of the Married Women's Property Act, 1882, " has worked well in practice and has provided a speedy and efficient remedy for matrimonial disputes affecting the title to property." The procedure has worked well in

6 (1961) 24 M.L.R. 101.

7 Cmnd. 1268, paragraph 4.

8 This is a very relevant consideration in the field of property rights. Any system of community of property, for example, not only gives rise to questions of who may deal with the community property and to what extent, but of how great a barrier any such system may in practice prove to marriage between people of different classes and financial standing. This is a field that needs far more careful study than it has yet received, but prima facie there seems a strong case for the conclusion that the virtual abolition, by the Married Women's Property Act, 1882, of a husband's rights over his wife's property, struck at the foundations of many of the class barriers of nineteenth-century England. If this is so, the introduction of any system of community might be expected to result in a reinforcement of class barriers.

practice and done substantial justice [9] since about 1950 [10] but not previously. The previous decisions in *Blackwell* v. *Blackwell* [11] and *Hoddinott* v. *Hoddinott* [12] were not just; that in *Montgomery* v. *Blows* [13] (only marginally concerned with property, but giving rise to dicta which were invariably cited in subsequent property cases) can hardly be too strongly condemned. Is it not a little complacent for the Committee to be so satisfied with the working of a provision which was badly misapplied for some seventy years and has been working reasonably for about ten years?

The proviso that the abolition of section 12 of the Married Women's Property Act, 1882, should be without prejudice to any right which a deserted wife may at present possess in the matrimonial home arises out of the judgment of Goddard L.J. in *Bramwell* v. *Bramwell*,[14] pointing out that the inability of a husband to eject his wife from the matrimonial home arose from his inability to proceed against her for the tort of trespass.[15] The Committee draws attention to the fact that: " The present state of the law regarding a deserted wife's right in the matrimonial home has not yet been the subject of any decision by the House of Lords and the law cannot be regarded as settled." This may be taken as an indication that the Committee considers that the question of possessory rights in the matrimonial home might be the subject of separate examination. It is to be hoped that if such an inquiry is conducted, it will not be

[9] Except where a wife is so ill-advised as to use her own money for household purposes and invest money received from her husband in durable assets. In *Fribance* v. *Fribance* [1957] 1 W.L.R. 384, a wife who did this was able to claim a share in the durable assets only because of the unusual circumstance that she could produce written evidence of an agreement with her husband that she should do so. It is also still not clear what is the position under s. 17 (as amended by the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 7) where the wife is dead and the surviving husband claims that she died owing him a debt.

[10] The decision of the Court of Appeal in *Newgrosh* v. *Newgrosh* (1950) (reported only in 100 L.J. 525) probably marks the watershed. The first good decisions are *Jones* v. *Maynard* [1951] Ch. 572 (Vaisey J.) and *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63 (C.A.).

[11] [1943] 2 All E.R. 579. The Court of Appeal held that dividends accumulated by a wife as a result of purchases from a co-operative society with money provided by the husband belonged exclusively to the husband.

[12] [1949] 2 K.B. 406. The Court of Appeal (Denning L.J., as he then was, dissenting) held that a win on a football pool resulting from forecasts made by the husband and wife jointly belonged entirely to the husband because the stake money (a few pence) was provided from a housekeeping allowance supplied by the husband.

[13] [1916] 1 K.B. 899. A husband earning 49s. a week represented his earnings to his wife as 30s. a week and allowed her a housekeeping allowance of 23s. a week for the maintenance of themselves and five children, while he retained 26s. a week for his private spending. On a Workman's Compensation claim by the wife in respect of her father, who lodged with them, the Court of Appeal held that (i) the wife was not partially dependent on her father and (ii) any profit she might make from the father's contributions to the income of the household belonged entirely to the husband (who was knowingly depriving his children of proper maintenance), since his wife must be deemed to be acting solely as his agent in respect of household arrangements.

[14] [1942] 1 K.B. 370.

[15] *Ibid.* at p. 374.

confined to the narrow question of rights of wife *v.* rights of husband and those claiming through him (including his creditors), but that the interests of infant children of the parties will receive separate consideration. This, of course, will be possible only if the whole question of the duty of maintenance from which the wife's rights to possession have been held by some judges to arise [16] is re-examined. English law has recently shown some belated and piecemeal recognition of the fact that in cases of conflict between husband and wife the interests of their infant children require separate consideration.[17] Historically, however, maintenance of infant children was regarded as a mere extension of a wife's common law right to maintenance. The result of this historical development has been that maintenance for an infant child is still on an inadequate scale [18] which takes no account of the fact that a young child requires constant care and supervision. The cost of such care should be included in the scale of maintenance for an infant child. Under the present scheme, if a wife cannot establish, or has forfeited, her own right to maintenance, adequate maintenance cannot be recovered for the child alone.[19]

This leads me to what I respectfully suggest is the outstanding defect of the Law Reform Committee's Report, that is to say the isolation for its consideration of one very restricted question. Family law in particular has suffered too long from piecemeal reform without regard to the general picture. It is not satisfactory that the Committee should be asked to consider only the narrow question " whether any alterations are necessary or desirable in the law relating to the liability in tort of one spouse to the other." Dr.

[16] *e.g.*, Denning L.J. in *Bendall* v. *McWhirter* [1952] 2 Q.B. 466 at 476.

[17] *e.g.*, the Matrimonial Proceedings (Children) Act, 1958, and the new powers given to magistrates over children of the family whenever they begin to consider a complaint by husband or wife under the Matrimonial Proceedings (Magistrates Courts) Act, 1960.

[18] In the magistrates' courts the maximum recoverable is now 50s. per week for a child. According to Cmnd. 1237 *Children in Care in England and Wales, March 1960*, the estimated average cost to local authorities of maintaining children in their care for the year 1959–60 is: £2 2s. 2d. for children boarded out; £8 11s. 5d. for those in local authority homes; £7 2s. for those in local authority hostels; £3 16s. 5d. for those in voluntary homes; £4 8s. 7d. for those in other accommodation.

[19] Thus the general principle is that if a wife commits a matrimonial offence (*quaere* cruelty) she loses her right to maintenance and can recover only maintenance for the child, which in the magistrates' courts is limited to 50s., whether the child is legitimate or illegitimate. Can it be doubted that the principal sufferer from such a system is the child?

In the conflict of laws the question is further confused by the theory of status (which is considered important) and its incidents (which are incidental, unimportant and governed by a different law or laws). This confused thinking has resulted in the present *reductio ad absurdum* of *Sowa* v. *Sowa* [1961] 2 W.L.R. 313 in which the Court of Appeal has dismissed " the lady's claim " for maintenance of herself and her child, because since her marriage was potentially polygamous, she cannot claim maintenance as a wife under the Summary Jurisdiction Acts. Here *semble* the child is in law neither legitimate nor illegitimate, and the simple device of a tribal ceremony exonerates his undoubted biological parent from any duty to maintain him by English law.

Glanville Williams's article, to which reference has already been made,[20] shows clearly that this is only one of the questions which require reconsideration in the law of tort as it affects members of a family. These questions are interrelated. At the risk of doing violence to Dr. Williams's careful study, I venture to summarise briefly the other reforms suggested in that article, with which I respectfully agree:

(i) The husband's action for general damages for loss of his wife's consortium should be abolished,[21] but should be replaced by actions for special damages properly incurred by members of an injured person's immediate family by reason of the injury. The rules for claims under the Fatal Accidents Acts [22] should be brought into line with those obtaining for non-fatal injury, particularly as regards contributory negligence.

(ii) The action for loss of earnings should be available to a married woman not in gainful employment and should cover the loss of her own working capacity and the cost of any substitute assistance required in the home.

(iii) Actions for enticement and damages for adultery should be abolished. It is submitted, however, that if this is done there should be far more stringent safeguards for the financial interests of infant children.[23]

(iv) Dr. Williams suggests that actions for seduction should be abolished. Whether this is accepted or not, there would probably be general agreement that such actions should (i) no longer be based on loss of services and (ii) result in damages awarded being held not for the benefit of the parent or guardian, but for that of the infant who has been seduced and any illegitimate child.

I would suggest that in one respect in this field the law requires strengthening. It is now possible for a parent or guardian to obtain an injunction to restrain an infant from associating with an undesirable person only where the infant has been made a ward of court.

20 *Supra*, note 6.

21 This is the preferred solution. I regret I must dissent from Mr. Fridman's views as set out in " Consortium as an ' Interest ' in the Law of Torts " (1954) 32 Can.B.R. 1065. I submit that the House of Lords was right to disallow such undesirable and potentially gold-digging actions as that brought by the wife in *Best* v. *Samuel Fox* [1952] A.C. 716 in respect of negligence resulting in her husband's impotence. But I respectfully agree with Dr. Glanville Williams that it is now time for the abolition of the husband's separate right of action.

22 Although not many details are available of damages awarded respectively to wife and children, the small amount of evidence I have accumulated suggests that here again the damages are weighted unduly in favour of the wife (who may remarry) and against the children (whose lot may become difficult in case of the mother's remarriage).

23 It is hoped that the Matrimonial Proceedings (Children) Act, 1958, may be the precursor of further safeguards for the infant children of separated and divorced parents, whose maintenance may be prejudiced by the remarriage of their father and whose rights to inherit on a parent's intestacy are now [subject to the Inheritance (Family Provision) Act, 1938, as amended in 1952] completely displaced as to the first £5,000 of the estate, by the rights of a spouse subsequently married.

This is a fairly expensive procedure [24] which is generally appropriate only where the infant is entitled to or will probably succeed to property. I suggest that the preventive procedure of an injunction should be obtainable by a parent or guardian to restrain any infant from associating with an undesirable person, without the necessity of making the infant a ward of court. If this were possible for people of limited means one obvious use would of course be to prevent too close an association between an infant and a married person of the opposite sex, and particularly one with infant children, but it might also serve a useful purpose in preventing young people from falling into undesirable associations generally, without invoking the machinery of the Children and Young Persons Acts.

O. M. Stone.

Attachment of Earnings Orders in Practice

Attachment of earnings was introduced into English law by the Maintenance Orders Act, 1958, as a new method for enforcing maintenance and affiliation orders where payments were in arrears.[1] Any assessment of the effectiveness of the new procedure must remain largely a matter of speculation in the absence of adequate judicial statistics about proceedings in magistrates' courts, where the great majority of attachment of earnings orders will be made.[2] Nevertheless some valuable light is thrown upon the working of the new procedure from what may seem an unexpected source, the Annual Report of the National Assistance Board for 1959.[3]

As is well known, it is the policy of the Board to encourage separated wives [4] or unmarried mothers, if they fall in need of national assistance, to obtain a maintenance or affiliation order for themselves or their children under the relevant statutes; and if necessary the Board will assist them with legal representation for this purpose at the Board's expense.[5] No information is available to the Board as to how wives and mothers may have fared in enforcing their orders under the new procedure of the 1958 Act. Exceptionally, however, the Board exercises its independent right under sections 43 and 44 of the National Assistance Act, 1948, to obtain orders on behalf of wives or mothers where for various reasons they

24 This has been reinforced by the recent decision in *Re P.C.* (*An Infant*) [1961] 2 W.L.R. 710, that a father who made his infant daughter a Ward of Court must pay the costs of the Official Solicitor as guardian *ad litem* of the infant.

1 See note of O. Kahn-Freund in (1959) 22 M.L.R. 175.

2 The annual Civil Judicial Statistics do not extend to civil proceedings before magistrates. The statistics of 1959 merely show that there were fifty-two attachment of earnings orders made by the High Court and twenty-one by county courts during the year (Cmnd. 1126, p. 42).

3 Cmnd. 1085.

4 The Board uses this term to describe wives who are living apart from their husbands in various circumstances, including as a result of a consensual separation, or because they have deserted, or been deserted by, their husbands.

5 Over 700 women were so helped in 1959 (Annual Report, p. 25). From May 9, 1961, legal aid has been extended to civil proceedings in magistrates' courts.

have not sought orders themselves.[6] Thus, during 1959 the Board invoked its right under these sections in 158 instances, ninety-four concerning a separated wife and sixty-four the mother of an illegitimate child.[7]

In the period between the coming into effect of the 1958 Act on February 16, 1959, and December 31, 1959, the Board had proceeded to enforce forty-one orders, obtained under sections 43 and 44, where payments had fallen into arrears. Eleven of these cases were ones unsuitable for the new procedure by way of attachment, as, for example, where the men concerned were self-employed. In the remaining thirty cases attachment of earnings orders were made, and the Board reports that in seventeen of these the orders were completely effective in ensuring full and regular payment.[8] In three other cases regular payment was secured but not at the full rate because the man's earnings did not leave sufficient margin above the minimum amount (known as the " protected earnings rate ") which the court decided he must be allowed for his own needs and, in the words of the Act, " for the needs of any other person for whom he must or reasonably may provide." [9] It was clear in one of these cases that the man was deliberately restricting his earnings. In another case no payments at all were received for some time because the man, through no fault of his own, was unable to earn more than the protected earnings rate. In seven cases the attachment order was effective for a period, but the men then either lost or deliberately relinquished their employment; it was clear that three of them had deliberately thrown up their employment because of the order. In the remaining two cases the orders were made too near the end of the year for any conclusion to be drawn from them.

Although it would be dangerous to infer too much from so small a sample of cases, the experience of the Board augurs well for the new procedure. In two-thirds of the cases the attachment order secured regular payment either in full or to the extent that the man's means would allow. In only four out of thirty cases was there evidence of deliberate evasion of the order. As the sample presumably consisted of cases presenting unusual features (else the original orders would not have been obtained by the Board), one may assume that at least as good results will be obtained in the ordinary cases where wives and mothers seek to enforce their own orders. As the extension of legal aid to such proceedings brings private practitioners increasingly into the magistrates' courts, it will be interesting to compare their experience with that of the Board.

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[6] *e.g.*, under s. 43, *N.A.B.* v. *Parkes* [1955] 3 All E.R. 1 (C.A.) [see (1956) 19 M.L.R. 90 and 623], and, under s. 44, *N.A.B.* v. *Mitchell* [1956] 1 Q.B. 53 [see (1956) 19 M.L.R. 636].

[7] Annual Report, p. 25.

[8] *Ibid.* p. 24.

[9] s. 6 (3) (*b*).

NOTES OF CASES

The High Costs of Buying a Trivial Element

Re Black Bolt and Nut Association [1] is the first case where the Restrictive Practices Court has held a price agreement to be in the interests of buyers in the home market. It therefore marks an important milestone in the history of the implementation of the Act. Its importance and interest are enhanced by the fact that the main argument in favour of the agreement accepted by the court is one which has never been prominent in economic discussions of price agreements.

The products covered by the price restrictions comprise a large number of different types and sizes of black bolts and nuts, carriage bolts and nuts and railway fastenings. The association has forty-four members supplying about 90 per cent. of these goods. About three-quarters of all supplies are bought direct from manufacturers by the users, the remaining one-quarter passing through the hands of stockholding merchants (who receive specified discounts). The judgment refers in several places to the circumstance that " in general, the cost of the fastenings is a trivial element in the total cost of the final product of which they form part, and even in constructional steelwork, where the evidence was that the proportionate cost of black bolts and nuts is highest, it is only of the order of 5 per cent." [2]

The court found that, because of the uniformity of prices charged by all sellers under the agreement, the buyers (including merchants) were spared the necessity of " going shopping " for supplies. Furthermore, there was little scope for price reductions in conditions of price competition, and the administrative costs of going shopping would outweigh any price benefits to the buyers. Thus the buyers would be worse off if the agreement were abrogated. The avoidance of this detriment by the agreement was held to constitute a " specific and substantial benefit " to the " public as purchasers " of fastenings, within the meaning of section 21 (1) (*b*) of the Act, and the benefit was held to outweigh likely detriments to the public interest arising from the agreement. This is a surprising decision.

The decision is premised, partly, on the court's conclusion that the prices under the agreement " have in fact been reasonable." " We do not think that overall they would have been lower had there been free competition in price; nor do we think, if the prices in the future are fixed in the same way as they have been fixed in

[1] L.R. 2 R.P. 50.
[2] *Ibid.* at pp. 54–55.

recent years, they will be higher than they would be under free competition." [3] The main ground for this conclusion appears to have been that the average rate of profit earned by members of the association was not high.[4] This meant, according to the court, that " on balance there is very little room for any decrease in prices." However, this inference does not necessarily follow from finding a reasonably low *average* rate of profits in an industry. Evidence was produced of the wide spread of the profits earned in various years by different firms in the association.[5] These differences suggest, prima facie, that uncontrolled competition would in due course eliminate the higher-cost firms in the industry; even assuming that a firm with a rate of profits equal to the " reasonable " average level could not reduce its prices and survive, those firms with above-average rates would be able to reduce prices, survive and, indeed, expand. There is no reason why price competition in the situation (as set out in the law report) could not lead to significantly lower prices.[6] The total costs of all member-firms of producing a given output when there is a price agreement provide no measure of the total costs of producing the same output when there is no price agreement, unless (among other things) the distribution of output between firms happened to be the same in the two situations. There is nothing in the judgment to explain why there would be no significant changes in the distribution of the total output if the agreement were abrogated.

There is a further point, almost certainly of less importance than that just mentioned. Under a price agreement each firm is likely to expand its selling efforts and activities: if additional business cannot be gained by offering to sell at lower prices than competitors, the natural tendency is for each firm to extend its sales-promoting activities (*e.g.*, by having more salesmen, visiting prospective buyers more frequently). This aspect of the workings of a price agreement is not mentioned in the judgment. The omission is somewhat surprising, particularly because so much attention is given in the judgment to the increase in buyers' buying costs should the agreement be abrogated. The combined total of " selling " costs and " buying " costs would seem to be the relevant magnitude: the judgment focuses on changes in one component only.

[3] *Ibid.* at p. 99.

[4] The sentence in the judgment quoted in the second-last sentence, above, is followed by this sentence: " Competition in price would not increase demand for the fastenings." It is not clear whether this is meant to be an explanation why prices would not be lower with free competition. Clearly, however, it would not be an acceptable explanation. A low price-elasticity of demand for a group of products may help to explain why a monopolist (or monopoly association of firms) is unwilling to reduce prices when, say, demand has declined. It has no relevance for the individual pricing decisions of each of a number of firms in conditions of " free competition."

[5] L.R. 2 R.P. 50 at p. 72.

[6] Indeed, it was argued for the association that " if there were free competition, prices would be kept at a low level. . . . " (at p. 67).

The argument turning on the costs of going shopping postulates that without the agreement merchants and large users (together accounting for two-thirds of all purchases) would "have to" (or "be compelled to," be under the "necessity" to) spend more money, time and effort ascertaining prices from competing sources of supply before placing their orders. This, according to the court —and according to buyer witnesses—would be so costly as to outweigh any possible reductions in prices (as compared with those ruling under the agreement). The immediate comment is that the buyers in question would soon learn that it did not pay to shop around too much, would adjust their buying practices accordingly, and save themselves the expense of doing so. To hold the opposite is to imply that these large commercial firms are unable to judge how much money and effort to invest in the particular buying activity, which would be a serious reflection on their commercial competence.[7] A systematic and persistent over-expenditure on arrangements for buying fastenings seems highly unlikely. Why would these firms feel unable to place orders for fastenings without extensive prior examination of the market, and feel compelled to engage in—so it is postulated—demonstrably wasteful and avoidable expenditures?

In trying to answer this question, we may rule out the explanation that the commercial firms in question as a group suffer from an obsessive urge never to pay more than is necessary for an item, however trivial it may be and whatever the cost of discovering the lower price may be. This seems to leave two possible explanations, the first of which is presented in the judgment.

The court considered whether "under free competition the industrial user would have the choice of restricting his purchases to one or two selected manufacturers and not going into the market generally to see if the goods can be obtained at a cheaper price."[8] But it seems to have dismissed this as an effective alternative, by stressing the importance of prompt and "timeous" delivery, and the relevance here of the inter-trading arrangements of the association, which would, it was said, be weakened by the abrogation of the price agreement. According to these arrangements, each manufacturer is entitled to buy fastenings from other manufacturers at agreed discounts; this enables him to act as a "merchant" who can supply all the requirements of a particular user-buyer even if he does not manufacture all the lines himself. The court said: "In times of great demand, when the problem of delivery is likely to be most important, there would be less prospect than under the present system of the single manufacturer's being able to satisfy the

[7] Counsel for the Association in *Re Wholesale Confectioners Alliance's Agreement*, L.R. 2 R.P. 135 suggested (at p. 145) that the "shopping" argument was stronger in that case than in the *Bolt and Nut* case because in the former the buyers were "small retailers" while in the latter they were "large organisations."

[8] L.R. 2 R.P. 50 at p. 90.

industrial user's requirements as to delivery. It seems to us that, if the uniform price were abolished, the industrial user would either have to incur the trouble and administrative expense of ' going shopping ' himself or would have to purchase his requirements from a stockholder who would have to go shopping for him." [9] However, the implied comparison between conditions with and without the arrangements seems to overlook an important point. In times of " great demand " the manufacturers themselves (in their capacity as " merchants ") will have to do more shopping around than usual, because supplies will be tight. It would be surprising, also, if at such times more users did not indulge in more shopping around than usual in order to make doubly sure of securing the necessary supplies. The price agreement does not augment supplies; and the inter-trading arrangements merely provide a particular mechanism for assisting in the distribution of supplies. Should the agreement and the inter-trading arrangement be abrogated, there is no reason why supplies should be smaller or why the matching of availabilities and requirements should be done less efficiently. The change might involve the growth of the business of non-manufacturing merchants, or even the development of new forms of merchanting activity (*e.g.*, that of non-stockholding brokers). But there is no reason why the *total effort* engaged in seeking out supplies should be greater. Moreover, inter-trading, though it has been increasing in recent years, is reported as being only 6 per cent. of total production.[10]

The second possible explanation is more complex. The judgment does draw attention to a feature of market activity which is almost invariably ignored in economic theory. It is a convenient simplification to assume in economic analysis that buyers and sellers enter a market fully informed about relevant variables such as prices, and that market information is acquired without cost. For most purposes, this simplification does not destroy the value of the analysis. Yet market information is in fact not freely available, and both buyers and sellers usually incur costs to obtain or to supply information, for example, about prices. Where the prices charged by all sellers are known by buyers to be uniform because there is an effective price agreement, the cost of complete information about the prices of all sellers may be very low; the price charged by one seller is the price charged by all sellers. Where, *per contra*, there is no uniformity in prices (or non-uniformity is suspected by buyers), it may be more costly—if it is indeed possible —for a buyer to obtain *complete* information about the prices of all sellers. But this difference between the two situations is not enough

[9] *Ibid.* at p. 90. It is interesting that in the *Wholesale Confectioners* case (see note 7), it was argued for the Registrar (at p. 151) that the distinguishing feature of the *Bolt and Nut* case was to be found in the special circumstances arising in " times of great demand."

[10] L.R. 2 R.P. at p. 75.

to ensure that buyers are better off with a price agreement among sellers. However, it is possible to conceive of a situation where a price agreement could be unambiguously in the interests of buyers, with the costs of price information assuming a key role.

Consider the hypothetical case of an industry which has a price agreement covering its wide range of products, with prices set at the average level of £a per unit. Assume that the agreement is abrogated. Assume further that unless at least an additional £b per unit is spent by (or on behalf of) buyers for discovering the ruling prices of the different sellers, the sellers would individually find it possible and profitable to adjust their (average) prices to £c per unit, c being greater than a. Buyers, that is to say, being insufficiently aware of competing prices, would tend not to switch their custom from one seller to another, and so not resist the increase in prices quoted by individual sellers. If, on the other hand, £b (or more) is spent on making price data available to buyers, assume that the (average) price level would settle at £d per unit, with d less than a (thereby providing the sellers with an incentive to have a price agreement), but with $(d + b)$ greater than a.[11] Here, then, the abrogation of the agreement would leave the buyers worse off: if they " went shopping " (or had shopping done for them), they would be worse off; and if they refrained from going shopping, they would also be worse off. The costs of obtaining information in a competitive market would, in this hypothetical situation, be excessive, so that monopoly prices, up to a certain level, *i.e.* $(d + b)$, would serve the interests both of sellers and of buyers.[12]

The special situation outlined above is likely to occur very rarely in practice, and is best considered as a *curiosum*. (This is not the occasion to attempt to specify rigorously the necessary conditions.) The special situation is not the situation which the court seems to have had in mind in the present case. Thus the court did not discuss in its judgment the pricing implications of the situation where all or many buyers decided not to go shopping. It also did not discuss the possibility that prices (to the manufacturers of bolts and nuts) might be higher without the agreement.

As it stands, the judgment is more interesting for the novelty of its argument than for its ability to convince. For, apart from the considerations already set out, it remains obscure why the avoidance,

[11] It is assumed, for simplifying the presentation, that sellers incur no price-information costs. This does not affect the issue.

[12] It might be asked why the average price under the agreement would not be set at £ $(d + b)$, rather than at the postulated lower £a. The answer could be the need for compromise in an agreement between the conflicting views of member-firms, or the fear of public intervention. So long as the average price under the agreement lies between £d and £ $(d + b)$, the result in the text follows.

It may be noted that if the firms in the industry were confident that buyers would not shop around sufficiently, they would not have any direct incentive to have a price agreement.

via the agreement, of the postulated increase in the cost of buying fastenings, which themselves are " a trivial element in the total cost of the final product of which they form part," should be of " substantial " benefit to the buyers of fastenings.[13] Even if the effective cost were doubled, it is not obvious that the element would cease to be trivial in relation to the cost of the goods incorporating the fastenings. The court, in fact, did not specify the yardstick by which it judged the substantiability of the benefit—the saving in administrative costs.

The avoidance of the cost of " going shopping " has been put forward as a defence of price agreements in subsequent cases. It has been rejected in both *Re Wholesale Confectioners Alliance's Agreement* and *Re Agreement between the Members of the British Bottle Association*. In the former case the court said that the *Bolt and Nut* case " was very special, and the circumstances totally different from those in the present case." It did not, however, indicate what were the distinctive features of the *Bolt and Nut* case. It might be suggested, in conclusion, that the triviality as a cost element of the goods in question does *not* seem to be an economically relevant distinguishing feature. The optimum amount to be spent by a buyer in " going shopping " for any item depends on the different levels of (expected) savings in price associated with different levels of " shopping " costs. The triviality of the item relatively to the firm's total expenditure on all goods and services does not affect the issue. (The total annual amount spent by a firm on an item is likely to affect its buying practices; a trivial cost element is not necessarily trivial in this sense.) Again, the triviality of the goods as an element in the user's costs is not a necessary ingredient of the hypothetical situation discussed above (p. 492), where it was shown that a price agreement could reduce the outlays (in price paid and shopping costs) made by buyers.

B. S. YAMEY.

A HARDY ANNUAL

As long ago as 1953 the Evershed Committee recommended the repeal of section 1 (3) of the Evidence Act, 1938.[1] This subsection, as construed by the courts, makes inadmissible in evidence in civil proceedings a statement in a document which is otherwise admissible under the Act, because the statement was made or founded on information supplied by a person interested in civil (or perhaps other) proceedings, whether they were pending or anticipated when

[13] The witnesses in favour of the agreement linked the administrative costs of " going shopping " with the costs of " the probable need for the precautionary inspection of goods on delivery " (at p. 95) if the agreement were abrogated. The court, however, attached little weight to this latter point (at pp. 86 and 96). The judgment turned essentially on shopping costs.

[1] *Final Report of the Committee on Supreme Court Practice and Procedure* (1953; Cmd. 8878), pp. 93, 94, 106, 325, paras. 272–274, 276, 320 (9).

it was made. Nothing has been done to carry out this recommendation, of course; and there has been a steady increase in the number of reports of decisions on the meaning of the word " interested " as used in the Act or its re-enactments overseas. Indeed, latterly these reports have become an annual event.[2]

The most recent reported English decision was given in *Bearmans, Ltd.* v. *Metropolitan Police District Receiver*, which was an action for compensation for damage, in pursuance of the Riot (Damages) Act, 1886. The alleged riot occurred on a Sunday afternoon, and took the form of the robbery of a suburban store by four men, following an assault on an elderly watchman. He gave two written accounts of the incident, one to the police a few hours afterwards, and the other to a representative of a firm of loss adjusters ten days later. As the watchman had died before the trial of the action, and the Crown did not claim privilege in respect of his statement to the police, the plaintiffs wished to use both statements as evidence admissible by virtue of the Evidence Act, 1938; in fact, without this evidence they would be unable to present a prima facie case, and in particular could not establish the number of participants necessary to constitute a riot. The question of the admissibility of the watchman's written statements was tried as a preliminary issue by Master Jacob. Among other points raised, one matter for decision was whether the watchman was a person interested in the proceedings. In an elaborate reserved judgment, delivered in the last Long Vacation, the learned Master reviewed the cases and referred to some comments on them, including a note in this *Review*[3]; and he decided that the watchman was not a person interested, and that his statements were admissible.[4] The Court of Appeal, consisting of Sellers and Devlin L.JJ. and Slade J., upheld the Master's decision and refused leave to appeal farther.[5]

Thus the pendulum of judicial thought has swung away from the earlier rigid view of the law, which gave the word " interested " the widest connotation, towards a more liberal attitude, which gives that word a narrow meaning. It may be paradoxical that a liberal view involves a narrow construction, but that is a consequence of the form of the subsection; in any event there can be little doubt of the trend of modern authority. In some cases a person had been regarded as disinterested only when he was independent,[6] but in *Bearman's* case Slade J. suggested almost the reverse, namely, that only a likelihood of bias should disqualify a

[2] *Tobias* v. *Allen (No. 2)* [1957] V.R. 221 (Vic. Aust.); *Kelleher* v. *T. Wall & Sons, Ltd.* [1958] 2 Q.B. 346; *Union Steamship Co. of New Zealand* v. *Wenlock* [1959] N.Z.L.R. 173 (C.A.); and notes 4 and 5, below.

[3] (1958) 21 M.L.R. 668.

[4] [1960] 2 Lloyd's Rep. 131; *The Times*, September 28, 1960. See also [1961] 1 W.L.R. at p. 637; [1961] 1 All E.R. at p. 395.

[5] [1961] 1 W.L.R. 634; [1961] 1 All E.R. 384 (C.A.).

[6] *Robinson* v. *Stern* [1939] 2 K.B. 260 at p. 268 (C.A.); *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.* [1941] Ch. 248 at p. 251; *Evon* v. *Noble* [1949] 1 K.B. 222 at p. 225.

document.[7] Devlin L.J. propounded a negative approach—that no witness ought to be held to be a person interested on a ground which would not be taken into consideration as affecting the weight of his evidence if he were actually called in court.[8] Sellers L.J. was content to apply the subsection in the light of the particular circumstances; but he adopted the view expressed in some recent cases that an employee of a party was not necessarily interested, even though there was a possibility that his reputation might be impugned.[9]

Devlin L.J. found three things in the Evidence Act, 1938, which pointed to the narrow construction of " interested " in section 1 (3).[10] The second was that the test of interest applies equally whether the maker of the statement is a witness or not. But, it may be argued, the fact that in the latter case the maker cannot be cross-examined as to his interest, though it may influence a judge in deciding on admissibility, does not seem a strong ground for limiting the scope of interest in general. The third was that the test of interest is to be applied on the assumption that the case is tried by a judge alone, because there is power under section 1 (5) to exclude even admissible documents when there is a jury. But the power is discretionary, and need not be exercised on the few occasions when there may be an opportunity to do so. The first and more convincing indication, which was previously suggested by Lord Evershed M.R.,[11] involves the relation between sections 1 (3) and 2 (1). The latter subsection recognises that the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts is relevant to cogency. The learned Lord Justice therefore considered that the weight of the evidence is primarily for the judge and it is unnecessary to enter into a nice calculation when considering whether the statement should be admitted. A similar conclusion had recently been reached *obiter* by Gresson P. in the Court of Appeal in New Zealand, where a letter written by a ship's officer was excluded in an action for personal injuries by a passenger, though not on the ground that the officer was interested. After pointing out that the corresponding subsections of the local statute overlap to some extent, the President said:

> " In my opinion, the court need not therefore be over-strict in excluding a statement on the grounds of personal interest, unless that interest is one which is real, definite or substantial. Cases in which a personal interest is said to arise because of relationship to one of the parties, or to the reputation or diligence of the maker of the statement becoming in issue, can

7 [1961] 1 W.L.R. 634 at p. 659.
8 *Ibid.* at p. 658.
9 *Ibid.* at pp. 648, 652–655.
10 *Ibid.* at pp. 655–657.
11 *Jarman* v. *Lambert and Cooke Contractors, Ltd.* [1951] 2 K.B. 937 at p. 940 (C.A.).

be adequately dealt with under section 4 . . . " [12] (section 2 of the English Act).

This interpretation at least reconciles two apparently contradictory subsections, though it does not make section 1 (3) much more easy to apply. However, it may be remarked that an alternative construction of section 2 (1) has been suggested.[13] It may have been designed for cases which were outside section 1 (3) on some ground other than lack of interest; for instance, because the statement was made when proceedings were neither pending nor anticipated. Assuming that the former interpretation is preferable, the main value of section 2 (1) appears to be the adventitious aid which it supplies in construing section 1 (3).

Indeed, section 2 (1) seems to be otherwise superfluous.[14] The marginal note to the section reads: " Weight to be attached to evidence," and subsection (1) is as follows:

> " In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts."

This subsection does not carry out the promise of the marginal note; it contains no positive enactment on the weight of evidence, such as a provision that a particular matter is prima facie or conclusive evidence. It is true that the subsection is mandatory in form, but in the majority of cases it would be impossible to establish that it had not been observed, and therefore to enforce any sanction for neglect. In other words, the enactment is primarily advisory, making suggestions to the tribunal as to weighing the admissible evidence. This curious provision no doubt had at least one precedent,[15] but when did it become the function of the legislature to give hints on cogency to the courts? Whom are the hints designed to help? The Act is not likely to be frequently invoked in the limited civil jurisdiction of the lay magistrates; while arbitrators and referees,[16] even when they are not lawyers, are usually

[12] *Union Steamship Co. of New Zealand* v. *Wenlock* [1959] N.Z.L.R. 173 at p. 190 (C.A.). The trial was with a jury, but no question of discretionary exclusion was decided, as the statement was excluded on the ground that there was no proof that it was not reasonably practicable to secure the attendance of the maker, who was beyond the seas.

[13] See Cowen & Carter, *Essays on the Law of Evidence* (1956) 25; Carter, " Evidence Act, 1938: Problems of Interpretation " (1952) 68 L.Q.R. 106 at p. 109.

[14] See also the writer's note in (1958) 21 M.L.R. 668 at p. 669.

[15] Rights of Way Act, 1932, s. 3; replaced by Highways Act, 1959, s. 35. Compare Inheritance (Family Provision) Act, 1938, s. 1 (7), as amended by Intestates' Estates Act, 1952.

[16] Evidence Act, 1938, s. 6 (1).

chosen because they combine special knowledge with ordinary acumen. In general the Act is administered by professional judges and, whether they sit alone or direct juries, they can derive little advantage from the enactment of " common-sense rules which would in any event be applied by any judge of experience." [17] Subsection (2) reads:

> " For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by this Act shall not be treated as corroboration of evidence given by the maker of the statement."

This provision is little more than the enactment of the rule previously laid down by the House of Lords, to the effect that a person cannot corroborate his own evidence,[18] and the rule would remain in full force without this reminder. When, if ever, Parliament finds time to repeal the subsection on interest, it might also think it desirable to repeal the whole of the section on cogency.

G. D. NOKES.

SOWA *v.* SOWA: POLYGAMY AND THE UNCHANGING WIND [1]

THE Divisional Court having given leave to the wife in *Sowa* v. *Sowa* [2] to appeal to the Court of Appeal on the ground that it was " desirable owing to the general importance of the matter, and not because of any doubt that it felt," [3] we now have the benefit of the views of the latter court on the unhappy situation in which the lady found herself. Counsel for the wife—unavailingly, for the decision was upheld on appeal—made several gallant attempts to secure justice for her. One line of argument was that in 1866—when *Hyde* v. *Hyde* [4] laid down the rule that parties to a polygamous marriage, even if it were *de facto* monogamous, were not entitled to the remedies or relief available under English matrimonial law, adjusted as it was to dealing only with the concept of the " Christian " marriage—magisterial courts had no such jurisdiction in matrimonial matters as they now have and hence that they were not, as was the High Court, bound by this rule. He also sought to say that the court was justified in treating the first marriage as monogamous and valid and all subsequent marriages as void—an argument which was in fact defeated in the *Hyde* case itself and was

17 Phipson, *The Law of Evidence* (1952) 288.
18 *R.* v. *Christie* [1914] A.C. 545 (H.L.).
1 This title is prompted by the note by Furmston in (1961) 10 I.C.L.Q. 180, entitled " Polygamy and the Wind of Change."
2 [1960] 3 W.L.R. 733; [1960] 1 All E.R. 687, noted by the present writer, *ante*, p. 183, where the facts are set out, and by Korah in (1961) 10 I.C.L.Q. 190. The present proceedings are reported in [1961] 2 W.L.R. 313; [1961] 1 All E.R. 687 (Holroyd Pearce, Harman and Davies L.JJ.).
3 [1961] 2 W.L.R. at p. 314, *per* Holroyd Pearce L.J.
4 (1866) L.R. 1 P. & D. 130.

thus bound to fail here. Counsel also pressed upon the court a submission that " practical convenience " required it to deal with potentially polygamous, but *de facto* monogamous, marriages. In this behalf, he prayed in aid section 3 of the Family Allowances Act, 1956,[5] as going to show that there was a real difference between polygamous marriages and marriages which, though potentially polygamous, have at all times been actually monogamous and that magistrates' courts ought thus to be allowed to entertain proceedings in respect of such marriages.

Whatever wind of change may have blown over this corner of the law in regard to the recognition in England of foreign dissolutions of marriages celebrated in England effected according to the domiciliary law by means appropriate to the dissolution of polygamous marriages,[6] it is abundantly clear that the Court of Appeal has now completely set the seal on the *Hyde* rule. It has also endorsed the view that it is the nature of the marriage *at its inception* which controls in the present context so that the fact that it remains monogamous must be beside the point.[7] In demolishing counsel's submissions, Holroyd Pearce L.J., who gave the leading judgment, remarked that the reasoning in the *Hyde* decision was " inescapable " [8] and considered that Lord Greene M.R. in *Baindail* v. *Baindail* [9] had shown that this reasoning applied to " matrimonial relief in general." [10] No logic or principle could support any distinction between the magisterial jurisdiction in these cases and that of the High Court, for one could not accord different meanings to the words " husband," " wife " and " married woman " according as they appeared in the Summary Jurisdiction

5 This reads: " As from the appointed day, a marriage performed outside the U.K. under the law which permits polygamy shall be treated for any purpose of the Family Allowances Acts 1945 and 1952, the National Insurance (Industrial Injuries) Acts, 1946 to 1954, the National Insurance Acts, 1946 to 1955, and this Act as being and at all times having been a valid marriage if and so long as the authority by whom any question or claim arising in connexion with that purpose falls to be determined is satisfied that the marriage has in fact at all times been monogamous."

It will be noted that this provision does not require the husband to have acquired an English domicile in order to attract the benefit of this provision.

6 See the cases discussed by Furmston, *op. cit.*, *supra*; Webb & Brown, *A Casebook on the Conflict of Laws* (1960), pp. 234–235. In *Ohochuku* v. *Ohochuku* [1960] 1 All E.R. 253, it would seem that the Nigerian courts would recognise the dissolution by the English court of the monogamous English marriage as effective to dissolve the potentially polygamous and earlier Nigerian one. In that case, to use Baty's words, the court was doing " no more than regulate the capacity of foreigners *in their English polarity*," which is " no more than England is strictly entitled to do " (*Polarized Law* (1914) at p. 29).

7 As is evident from *Mehta* v. *Mehta* [1945] 2 All E.R. 690. A more generous view was taken in the *Sinha Peerage Claim* [1946] 1 All E.R. 348n. *Cf.* also *Royal* v. *Cudahy Packing Co.*, 195 Iowa 759 (1922) (Supreme Court of Iowa). But, as was pointed out by Holroyd Pearce L.J. at p. 317, cases on succession and the like (where the person whose marriage is in question is dead) are treated on a different footing.

8 [1961] 2 W.L.R. at p. 315.

9 [1946] P. 122, esp. at pp. 125, 126 (C.A.).

10 [1961] 2 W.L.R. at pp. 315–316.

Acts or the Matrimonial Causes Acts. The mere fact that the former Acts gave different relief for different causes from the latter statute was not a ground for inferring that the *Hyde* rule did not govern the former Acts. Further, had the legislature meant that rule to apply to the Summary Jurisdiction Acts, it would have clearly expressed such intent. The attempt to call in aid the 1956 Act proved equally ill-starred since the learned judge could find no justification for such a departure from principle—though Parliament might, if it desired, make provisions similar thereto to cover cases such as the present one. He regarded such provisions as likely to be attended " by many obvious incongruities and difficulties." [11] As, indeed, he had said earlier, when disposing of the argument based on " practical convenience," " the fact that a marriage happens at the moment to consist only of two formerly single spouses is irrelevant and may be altered at any time by the husband taking another wife. A husband could always invalidate a pending summons simply by so doing. Such a situation would be incongruous and shows the undesirability of seeking to alter the principle on the ground of convenience in particular cases." [12]

The inevitability of this decision must really have been a foregone conclusion in the light of the case-law and of the accepted canons of statutory interpretation, especially that which prevents a court from embarking on a voyage of discovery in order to fill in gaps left by the legislature.[13] Sharing, as one surely must, the regret expressed by both courts and in the hope expressed by Harman L.J. that justice could be " wrung " from the husband by means of a breach of promise suit,[14] one is prompted to delve deeper to discover what other relief might be available to such a wife seeking financial relief. On the grounds of common humanity, she is entitled to all the " back door " relief she can get to make up for what she cannot obtain at the " front door." It is earnestly to be hoped that she would not be thought to be obtaining the matrimonial relief denied to her here were she, assuming that the circumstances were otherwise appropriate, to pledge her husband's credit as his agent, *e.g.*, for necessaries supplied to her and the child. Further, since the child is under sixteen and legitimate, both parents are liable to maintain it under the National Assistance Act, 1948, s. 42. Were the facts to warrant it, there would seem to be nothing to prevent the wife's approaching the Board for assistance for the child and the Board's then applying for an order to recover the cost thereof from the husband.[15] This argument

11 [1961] 2 W.L.R. at pp. 315–317.

12 [1961] 2 W.L.R. at p. 316.

13 *Magor & St. Mellons R.D.C.* v. *Newport Corpn.* [1952] A.C. 189, especially *per* Lord Simonds at p. 191 (H.L.).

14 [1961] 2 W.L.R. 318.

15 See ss. 7 (5), 42 (1) and 43 of this Act. The *ratio* of *Seedat's Executors* v. *The Master (Natal)* [1917] S.A.L.R. (A.D.) 302 (Supreme Court of South Africa) would seem to favour this view.

does not depend on the monogamous or polygamous nature of the marriage, but, when considering whether, if the wife were to seek assistance for herself, the Board could then ask for an order from the husband,[16] different considerations arise. One must then ask whether this legislation is geared solely to the " Christian " marriage. *Ex facie*, no doubt, this is so, but there appears to be no cogent reason apparent from the *Hyde* decision which requires application of that rule in this context.[17] Bastardy proceedings, on the other hand, are clearly unavailing, for it is plain that the child is legitimate and that no claim can be made in respect of a legitimate child.[18] Whatever may be the solution of this unfortunate lady's lot, it is evident that some statutory wind of change is called for to prevent future claims of this kind being met with a similar *non possumus*.[19]

P. R. H. Webb.

Sowa *v.* Sowa: Maintenance of Family Dependants

Two major questions concerning the approach of the English courts to the maintenance of family dependants appear to arise from this decision:

(1) In this, as in other cases previously, the Court of Appeal has taken as its starting point a consideration of the marriage ceremony, and in particular has once more based itself upon the decision in *Hyde* v. *Hyde and Woodmansee* [1] that " the matrimonial law of this country is adapted to the Christian marriage." I suggest that it is now time that the equation of the monogamous with the Christian marriage was abandoned because (a) it does not and never has correctly represented the limits of the jurisdiction of the English courts; (b) it is historically unfounded; and (c) it is particularly unfortunate in the context of polygamous marriages today.

Briefly, as to (a), the English courts have always recognised as valid marriages celebrated in this country according to Jewish

[16] See ss. 42 (1) and 43.

[17] It might, of course, be said that s. 3 of the 1956 Act does not cover the National Assistance legislation in express words, so that it is available only to the parties to a monogamous union in the " Christian " sense. However, a court having the same kind of courage as the Court of Appeal which decided *Travers* v. *Holley* [1953] P. 246, might be prepared to embark on the necessary judicial legislation at the risk of ignoring the *Magor* decision.

[18] *Kruhlak* v. *Kruhlak* (*No. 2*) [1958] 2 All E.R. 294 (D.C.).

[19] A bold soul might be tempted to suggest that, since the parties already possessed married status, there would be no objection to granting the wife a decree of specific performance compelling the husband to convert the marriage into a monogamous one. One cannot help feeling that the policy behind s. 79 (10) of the Marriage Act, 1949 (and earlier legislation which it replaces), militates against this view.

[1] (1866) L.R. 1 P. & D. 130.

rites,[2] and have assumed matrimonial jurisdiction in relation to such marriages, to marriages celebrated in accordance with Japanese rites [3] and Soviet Russian rites.[4] The Court of Appeal has held that a man married according to the Hindu rites of his domicile " has the status of a married man " so as to prohibit his remarriage at an English registry office during the continuance of his Hindu marriage.[5] Moreover, the registry office marriage in England is (and should be) a civil and not a religious ceremony, though certainly monogamous.[6]

As to (b), it is undeniable that monogamous marriage was a system of social organisation universal among all the peoples of what is now Western Europe long before the birth of Christianity. Witness the ancient Greeks and Romans, the Germanic tribes [7] and the Celts of Britain.[8] The Christian Church, which originated among a polygamous people, merely extended the area of monogamy, but had no part in its invention. The fact that the Christian marriage was for some twelve hundred years superimposed in this country on a monogamous union of immemorial antiquity is no justification for the equation of two entirely separate and distinct phenomena.

As to (c), in dealing with the institution of marriage among people who still retain polygamy, it is particularly unfortunate that this false equation should be persisted in. There is surely no advantage in attempting to persuade polygamous people, against the facts of history, that the institution of monogamy is necessarily geared to and involves the acceptance of any Christian concept. In talking to Africans, particularly those from Ghana and Nigeria, I have noticed that they almost invariably refer to the monogamous marriage provided for by the Marriage Ordinance of both countries as a Christian marriage. This fallacy should be eradicated and not supported. Monogamy does not stand or fall with belief in Christianity.

(2) *Sowa* v. *Sowa* was concerned with the duty of a man residing in England to maintain his " wife " (in the broadest sense) and infant child. There is no reason why the courts should approach legislation dealing with the maintenance of dependants as necessarily geared to and dependent on jurisdiction in divorce. In

2 See *Andreas* v. *Andreas* (1737) 1 Hag.Con.App. 9; *Lindo* v. *Belisario* (1795) 1 Hag.Con. 248, Lord Hardwicke's Act (the Marriage Act, 1753, now the Marriage Act, 1949, s. 26). In *Penhas* v. *Tan Soo Eng* [1953] A.C. 304, the Privy Council advised that a marriage ceremony in Singapore between a Jewish man uttering Jewish prayers and a Chinese woman uttering Chinese prayers (each incomprehensible to the other) constituted a valid monogamous marriage according to English common law.

3 *Brinkley* v. *Att.-Gen.* (1890) L.R. 15 P.D. 76.

4 *Nachimson* v. *Nachimson* [1930] P. 217; *Kenward* v. *Kenward* [1951] P. 124.

5 *Baindail* v. *Baindail* [1946] P. 122.

6 *Cf. Maher* v. *Maher* [1951] P. 342.

7 Tacitus: *Germania*, Chap. 18.

8 Tacitus: *Life of Agricola*, Chap. 16. Caesar in *De Bello Gallico*, Bk. V, Chap. 14, was retailing fairy tales.

this case, as in *Wood* v. *Wood*,[9] the court was concerned with the duty of a man in this country to maintain his undoubted biological child. For this purpose it was quite unnecessary to go into the question of the kind of ceremony that had been performed between father and mother (or, in *Wood* v. *Wood*, whether it had been validly dissolved), nor need the court have limited itself to considering, and dismissing, " the lady's claim." In this case the farcical result seems to be that the child is neither legitimate for the purpose of maintenance under the Summary Jurisdiction Acts, nor illegitimate for the purpose of maintenance under the Affiliation Proceedings Act, 1957.[10] Could there be a clearer illustration of the shortcomings of the dogmatic approach to a purely practical question?

The Court of Appeal was, I suggest, undoubtedly right to reject the distinction between the potentially and the actually polygamous marriage, which would open wide the door to evasion and might well have the effect of encouraging polygamy, especially now that proxy marriages are clearly recognised.[11] The appropriate criterion seems to be: " Was this a ceremony recognised as lawful by the *lex loci contractus*, and not contracted during the continuance of any previous marriage (in a similar broad sense)? "

The other reform indicated by the decision as both necessary and urgent is the complete severance of the duty of maintenance of infant children (legitimate or illegitimate or neither), which in the case of legitimate children should no longer be regarded as a mere extension of the duty to maintain a wife, and should be on a far more generous scale which could, in the case of a (biological) parent of adequate means, completely cover the cost of maintaining a young child without hardship to the child or the other parent or charge to the public funds.[12]

O. M. Stone.

Hire-Purchase: Estoppel—Penalties

Campbell Discount Co., Ltd. v. *Gall* [1] and *Campbell Discount Co., Ltd.* v. *Bridge* [2] are cases which raise fundamental legal problems, in the one instance of the operation of statute law, agency and estoppel, in the other of the law relating to penalties and the power

[9] [1957] P. 254.

[10] Proceedings under this Act had been initiated and abandoned. On the authority of *Baindail* v. *Baindail* the " wife " is probably not a single woman within the meaning of the Act, certainly for the purpose of obtaining an order against her " husband."

[11] *Apt* v. *Apt* [1948] P. 83; *Ponticelli* v. *Ponticelli* [1958] P. 204.

[12] See note 18 p. 484, *ante*. In *Cooke* v. *Cooke* [1960] 3 W.L.R. 807 the Divisional Court held that reasonable belief in the wife's adultery was an answer to wilful neglect to maintain her but not an answer to wilful neglect to maintain the child, which was in law a separate complaint.

[1] [1961] 2 W.L.R. 514; [1961] 2 All E.R. 104.

[2] [1961] 2 W.L.R. 596; [1961] 2 All E.R. 97.

of courts to rewrite, or at any rate to interfere with the terms of, a contract agreed between the parties.

In *Campbell Discount Co., Ltd.* v. *Gall* the buyer of a car on hire-purchase terms signed his name to a blank hire-purchase contract supplied to the dealer by a finance company. The dealer entered the wrong price and sent the contract to the hire-purchase company, which bona fide accepted the transaction and paid the dealer the price stated on the hire-purchase contract, less the sum deposited with the dealer by the buyer. When a copy of the contract was sent to the buyer, he realised that the price and the amount and number of the instalments required for its payment were incorrect, and he refused to pay. The finance company took possession of the car and claimed payment of four of the monthly instalments. The buyer counterclaimed for the return of his deposit. Both claims depended upon whether in fact there was a valid concluded agreement between the buyer and the finance company. It was held by the Court of Appeal that no such agreement had ever been concluded.

The facts of the case raised three different problems: (1) how far the operation of the Hire-Purchase Acts, 1938–54, upon an agreement may be excluded by documents or conduct; (2) whether the dealer was the agent of either, and if so which party; (3) could the buyer be estopped by his negligence in signing the hire-purchase contract in blank from denying the truth of its contents as against the finance company?

1. *The Hire-Purchase Acts*

The buyer raised the point that, even if there were a contract between himself and the finance company, it was unenforceable, because his signature in blank failed to comply with the provisions of section 2 (2) (*a*) of the 1938 Act, under which *inter alia* a note or memorandum of the agreement must be made and signed by the hirer (*i.e.*, the buyer).[3] Under the 1954 Act, the provisions of the 1938 Act apply only where the price of the goods involved does not exceed £300. *Ex facie* the agreement the price of the car was over this limit: therefore the 1938 Act did not appear to apply. The Court of Appeal did not allow this apparent exclusion of the Acts to operate, on the grounds that parol evidence was admissible to show either what the true terms of the contract were or that a contract was within the Hire-Purchase Acts, despite the contents of a written agreement and, as a possible additional ground, that no conduct on the part of the buyer could estop him from raising the issue that the contract was within those Acts.[4]

The point here is that the Hire-Purchase Acts, like the Bills of

3 *Eastern Distributors, Ltd.* v. *Goldring* [1957] 2 Q.B. 600.
4 [1961] 2 All E.R. 104 at p. 107.

Sale Acts and the Rent Acts, must be allowed to operate on transactions which in fact come within their scope, whatever any documents relevant to the transaction may say.[5] The parties cannot, by skilful or artful language or representations in their contract, or other document witnessing their transaction, evade the mandatory requirements of the appropriate statute. For to allow this to occur would be to frustrate the intentions of the law, and so to deprive parties to the transaction, and strangers in proper circumstances, of the protection afforded them by the statutes in question.

2. *Agency*

Because of the mistake about the price of the car, the question whether the dealer was an agent assumed great importance. For if he were the agent of the company, the company would be bound by the price he had orally agreed with the buyer, *i.e.*, £265: and if he were the agent of the buyer, then the buyer would be bound by the representation the dealer had made to the company that the price was £325.

In favour of the conclusion that the dealer was the company's agent were the following facts: he decided the price and the rates of repayment, received a commission from the company on the transaction, gave the price of the goods to the buyer, thereby fulfilling a requirement of the Hire-Purchase Act, 1938,[6] and received the initial rental on behalf of the company. All of these were rejected by Holroyd Pearce L.J. as decisive of the question.[7] So, too, was the argument that the mere provision of hire-purchase forms by the company to dealers for transactions of this kind showed that all such dealers acted as agents of the company. In an earlier case,[8] not really involving the point at issue, Diplock J. stated that there was much to be said for the view that, in authorising the dealer to proffer on delivery of the goods a document containing the terms of a hire-purchase agreement, the company, when the goods were in fact delivered against signature of the delivery receipt, accepted by conduct the buyer's offer, constituted by the buyer's signature of that agreement, so that a binding contract was thereupon made, or at least that the company by their conduct were estopped from denying that such a contract then existed. However, in the instant case, Holroyd Pearce L.J. was not prepared to accept this either as valid or as binding on the facts before him.[9] The fact that the dealer was habitually concerned in

[5] For examples involving the Bills of Sale Acts see *Re Watson* (1890) 25 Q.B.D. 27; *Madell* v. *Thomas* [1891] 1 Q.B. 230; *Beckett* v. *Tower Assets Co.* [1891] 1 Q.B. 638; *Polsky* v. *S. & A. Services* [1951] 1 All E.R. 185.

[6] Hire-Purchase Act, 1938, s. 2 (1): "Before any hire-purchase agreement is entered into in respect of any goods, the owner shall state in writing to the prospective hirer otherwise than in the note or memorandum of the agreement, a price at which the goods may be purchased by him for cash. . . ."

[7] [1961] 2 All E.R. 104 at pp. 107–108.

[8] *Lowe* v. *Lombank, Ltd.* [1960] 1 All E.R. 611 at p. 617.

[9] [1961] 2 All E.R. 104 at p. 108.

arranging the acceptance by the finance company of an agreement for the purchase of cars on hire-purchase did not make the dealer the company's agent, any more than the fact that the buyer was concerned in such an arrangement made him the agent of the company on one particular occasion.[10]

Nor could it be said that the dealer was the agent of the buyer. He would not be in normal circumstances: and the fact that the buyer had given the dealer a signed hire-purchase agreement did not affect the situation. This was only done to enable the dealer to sell the car to the finance company before the latter sold it to the buyer. The dealer did everything in the pursuance of his own interests, not for the benefit of the buyer on hire-purchase.[11]

The dealer, therefore, would appear to be on this reasoning a middleman who is an independent contractor and not an agent, someone whose position resembles that of a retailer who acts as a conduit pipe between the wholesaler and the eventual retail buyer.[12] No doubt in proper circumstances it might be argued that a dealer could be the agent of either the finance company or the buyer on hire-purchase. But in the light of what was said in this case it seems difficult to imagine circumstances in which such a situation would arise. In truth, as Diplock J. said in *Lowe* v. *Lombank*,[13] though the courts are becoming familiar with the mechanics of hire-purchase, the legal relationship between the hirer (*i.e.*, the buyer), the dealer and the hire-purchase company at various stages in the transaction still involves many problems which have not been authoritatively solved.

Could it not be argued that, since dealers in these days normally sell vehicles on hire-purchase and undertake to arrange the necessary finance for the buyers, the dealer has by mercantile custom become an agent for the arrangement of such transactions? But, if so, whose agent is he? Does the fact that a dealer normally arranges such transactions through one particular finance company lead to the inference that he has become the agent of the company for such purposes, either by holding out or by custom, *i.e.*, implication? Or should the dealer be regarded more like a mercantile agent, whose services in the arrangement of hire-purchase contracts are employed by a prospective buyer on hire-purchase when he goes to the dealer to buy a vehicle? [14] The reasoning and language of Holroyd Pearce L.J. in the instant case are against the first suggestion. But they do not conclusively decide against the second.

[10] *Ibid.*

[11] *Ibid.*

[12] *Cf.* the position of the manufacturer of tools supplied to an employer for use by his employees: the employer will not be liable for breach of the duty of care he owes his employee if the tool is faulty: *Davie* v. *New Merton Board Mills, Ltd.* [1959] A.C. 604.

[13] [1960] 1 All E.R. 611 at p. 617.

[14] On agents with implied authority and agency by estoppel, see Fridman, *Law of Agency*, pp. 86–91, 95–100. See also *ibid.* pp. 24–25, 54–60.

3. *Estoppel*

Having decided that the dealer was not the agent of either party, the court was faced with one final possibility. Could it be said that the buyer was estopped from raising the mistake as to the price by his conduct in allowing the dealer to have and make use of a signed hire-purchase agreement? On the facts this court rejected the suggestion that the buyer had given the dealer apparent authority to transact with the finance company, *i.e.*, that although the agent was not *ab initio* the buyer's agent, he became one subsequently, as a result of the representation contained in the possession of the agreement that the dealer had the buyer's authority to make a contract with the finance company on his behalf.[15]

The other suggestion, that the buyer was estopped by his negligence from repudiating the agreement, irrespective of any question of agency, involved the court in legal, not factual, decision. It was held, on three grounds, that the negligence in question did not give rise to any estoppel: because negligence only gave rise to estoppel where there was a duty of care owed by the person making the representation to the person to whom the representation was made, because the doctrine of estoppel by negligence applied only to negotiable instruments, and because, in any event, the proximate cause of the loss to the finance company was not the negligence of the buyer but the unforeseeable fraud (or mistake if such it were) of the dealer.[16] The point which is of greatest interest in the present context is whether the doctrine of estoppel by negligence is limited in the way suggested by the court. There are really two separate principles put forward: on the one hand, that the doctrine of estoppel by negligence only operates where a duty of care exists: on the other, that the doctrine is even more limited in its application in that it only applies to negotiable instruments. If the second is correct, the first principle is either wrong or unnecessary. If the first is correct, then the application of the doctrine to negotiable instruments may be regarded as one instance where a duty of care is owed by one party to the other. I have suggested elsewhere [17] that the only circumstances in which a duty of care is owed so as to involve the operation of estoppel by negligence in proper cases are where there is the likelihood of physical or proprietary damage as a result of reliance upon the representation made by the person against whom the estoppel is raised. However, even if there is negligence which affects a question of property, an estoppel will only arise where the representor cloaks another person with apparent indicia of title or authority to deal with title: and the basis

[15] Distinguishing the case of *Eastern Distributors, Ltd.* v. *Goldring* [1957] 2 Q.B. 600; see the discussion of this case in Fridman, *op. cit.*, pp. 182–186.

[16] Another possible ground was that estoppel by negligence did not apply where the agreement alleged to result from the estoppel was unenforceable under the Hire-Purchase Acts.

[17] Fridman, *op. cit.*, pp. 57–58, see also *ibid.* pp. 178–186, 251.

of this is not negligence but apparent title or apparent authority.[18] In the case of negotiable instruments, there is also a duty of care,[19] so that the negligence of the maker of the instrument will more easily raise an estoppel against him should his agent exceed his authority, or should some other person, not the maker's agent, deal wrongfully with the instrument. In other words, estoppel in the case of negotiable instruments, though it does involve the notion of duty of care, is also an example of estoppel resulting from holding someone out as owner or as agent. This, it is suggested, invites the conclusion that the doctrine of estoppel by negligence applies only where the negligence would lead someone to err about title to property,[20] or where there is a duty to use care not to cause proprietary (as opposed to physical) loss to another person: and negotiable instruments can give rise to estoppel by negligence either because a duty of care is owed in respect of such instruments or because they involve title or authority to deal with title.

The issue in the instant case was whether a contract had been concluded between the company and the buyer, not whether title in the vehicle had passed from one to the other. Hence estoppel by negligence would only operate if it could be said that a duty of care existed. Here, once again, was an opportunity for the court to enlarge the scope of the notion of duty of care. But the court preferred to state that the only documents in respect of which such a duty existed were negotiable instruments.[21] Moreover, since it had been decided that no apparent authority had been given to the dealer by the buyer, it was not possible to bring into play the other kind of situation in which negligence by a representor will raise an estoppel against him. It seems a pity that the courts are not prepared to extend the application of the idea of duty of care to circumstances in which contracts involving property are concerned. In such instances, it could be argued, reliance to one's detriment upon a negligently made statement ought to give rise to an obligation based upon the statement.[22] However, the courts are reluctant to carry the modern principles of negligence to their logical conclusion.[23]

Another illustration of this reluctance to extend principles is provided by the other case, *Campbell Discount Co., Ltd.* v. *Bridge*.[24] There the hire-purchase agreement provided that the buyer could terminate the contract by giving written notice to the owners. If

18 See *Central Newbury Car Auctions, Ltd.* v. *Unity Finance Ltd.* [1957] 1 Q.B. 376: discussed in Fridman, *op. cit.*, pp. 178–182.
19 *Wilson & Meeson* v. *Pickering* [1946] K.B. 422.
20 As it did in *Eastern Distributors, Ltd.* v. *Goldring* (*supra*) but did not in *Central Newbury Car Auctions, Ltd.* v. *Unity Finance, Ltd.* (*supra*).
21 *Cf. Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164.
22 As it sometimes does when the statement is made, not negligently but with the intention that it should be acted upon: Fridman, "Promissory Estoppel" (1957) 35 Can.B.R. 279.
23 *Cf.* Fridman, "Negligence by Words" (1954) 32 Can.B.R. 638.
24 *Supra.*

he did so, then, *inter alia*, he had to pay the owners, "by way of agreed compensation for depreciation of the vehicle such further sum as may be necessary to make the rentals paid and payable . . . equal to two-thirds of the hire-purchase price." After paying the first instalment, the buyer terminated the agreement and returned the car. The owners claimed a sum of money under the clause quoted above, to which the buyer said that either the sum was a penalty, or that he was entitled to equitable relief from payment of it. No breach of contract had taken place, for the contract had been determined in accordance with its provisions. So the question arose whether the law relating to penalties [25] applied to a case where no breach had taken place, but the contract provided for the payment of a stated sum upon its determination at the option of one of the parties.

In *Associated Distributors, Ltd.* v. *Hall*,[26] on somewhat similar facts, it had been held by the Court of Appeal that the sum claimed was recoverable, because no question of penalty or liquidated damages arose: what the party had done was to exercise his option to terminate in accordance with the provisions of the contract. The sum payable was the price of the hirer's or buyer's right to terminate.[27] In the instant case, it was argued that this decision had been overruled, impliedly, by the Court of Appeal in *Cooden Engineering Co., Ltd.* v. *Stanford*.[28] But the point in issue in that case was different: for a breach of contract had in fact occurred, and what that case decided was, in the words of Devlin L.J. in *Alder* v. *Moore*,[29] that where money was expressed as payable on an event and that event was also a breach of contract, if the sum was penal in amount it could not be recovered. Moreover, in the *Cooden* case, even where the event upon which the money was payable was a breach of contract, *viz.*, non-payment of rental, and even where the entire court held that the amount payable was clearly a penalty, Jenkins L.J. was prepared to dissent, and to apply the reasoning in the *Associated Distributors* case. Hence the Court of Appeal in the instant case felt obliged to follow the earlier case, and to hold that the question whether the clause involved a penalty or liquidated damages was irrelevant.

The result, therefore, was that, by being honest and terminating the contract in a proper and gentlemanly manner, the buyer let himself in for the payment of a large amount, when, had he broken the contract, it might have been held that he was not liable for such amount because it was a penalty (though this point was not

[25] See *Dunlop Pneumatic Tyre Co., Ltd.* v. *New Garage & Motor Co., Ltd.* [1915] A.C. 79.
[26] [1938] 2 K.B. 83.
[27] *Campbell Discount Co., Ltd.* v. *Bridge* [1961] 2 All E.R. 97 at p. 101, *per* Holroyd Pearce L.J.
[28] [1953] 1 Q.B. 86. This opinion was held by Denning L.J. in *Lamdon Trust, Ltd.* v. *Hurrell* [1955] 1 All E.R. 839 at p. 842.
[29] [1961] 1 All E.R. 1 at p. 8.

decided by the court, which appears to have leant in the direction of holding that the sum in question was not so exorbitant as to be a penalty).

Nor was the court disposed to interfere with this unsatisfactory position by invoking any general equitable jurisdiction to relieve the hirer: for equity would not interfere with freely contracted agreements, however harsh or disadvantageous to one of the parties, unless there was something in the nature of fraud, sharp practice, or other improper or unconscionable conduct on the part of the party attempting to obtain specific performance of the contract.[30] For the Chancery mends no man's bargain (unless, of course, there has been fraud, mistake, etc.).[31]

The court's attitude was that, if relief were desirable in such cases, and the court thought that it probably was, it should be achieved by legislation. This had been done in the case of hire-purchase contracts involving goods up to a certain value, below that of the goods in the present case. It might be suggested, however, that the legislature should extend the provisions and protection of the Hire-Purchase Act, 1938, to all contracts of hire-purchase. But this would still leave out other contracts, *e.g.*, of hire or of employment. Why then should not the courts themselves create new, or adapt existing principles to permit relief in proper cases? They do so where breaches of contract have taken place and the contract provides for the payment of a sum which the courts castigate as a penalty. Could not the same be done, along similar lines, where the contract is terminated by agreement?

It may be thought that in this case the court was behaving very timorously once again, refusing in an appropriate case to extend by analogy or adaptation well-known and reasonable rules of law. On the other hand to have done so would have been to break two equally well-established general principles, namely, that freely made bargains should not be upset by the courts without proof of improper conduct by one party, and that equitable rules are now well established and, in the words of Harman L.J.,[32] cannot be bandied about in common law courts as though the Chancellor still had only the length of his own foot to measure when coming to a conclusion.

The point here, and it is a very important one, is whether new principles of law should be created by the courts, either by adapting common law rules or developing new equitable ones by analogy, or should be left to the discretion of Parliament, which ought to be the

30 See the discussion in *Stockloser* v. *Johnson* [1954] 1 Q.B. 476 of *Re Dagenham Dock Co.* (1873) 8 Ch.App. 1022, *Kilmer* v. *British Columbia Orchard Lands, Ltd.* [1913] A.C. 319, *Steadman* v. *Drinkle* [1916] 1 A.C. 275, *Mussen* v. *Van Diemen's Land Co.* [1938] Ch. 253.

31 *Campbell Discount Co., Ltd.* v. *Bridge* [1961] 2 All E.R. 97 at p. 103, *per* Harman L.J. quoting *Maynard* v. *Moseley* (1676) 3 Swan. 651 at p. 653.

32 *Campbell Discount Co., Ltd.* v. *Bridge* [1961] 2 All E.R. 97 at p. 103; *cf.* the disputes about the existence of an equitable doctrine of restitution in case of unjust enrichment and the deserted wife's rights in the matrimonial home.

repository of the social conscience. For the student of jurisprudence, and in particular of the relationship in modern times between the courts and Parliament, this case is of great interest and importance.

G. H. L. Fridman.

Wives in Need and Problems of Double Support

A wife may look for financial support not only to her husband but also to the National Assistance Board if in need. This double right of support (which the husband, too, now has in certain circumstances [1]) is constantly creating new and interesting problems, as two recent cases show.

In *Slater* v. *Slater* [2] the Court of Appeal held that a judge or registrar, when fixing the amount of alimony pending suit, is entitled to take into account the fact that the wife is in receipt of national assistance but is not bound to refuse alimony or reduce its amount by reason of this fact: it is a matter for his discretion. The court were following their previous decision in *Sterne* v. *Sterne*,[3] although in that case the discretion was exercised adversely to the wife's application. In *Slater*, however, both the registrar and the judge on appeal awarded alimony pending suit, despite the wife's being in receipt of assistance. Counsel for the husband had argued from old authorities [4] that it was only the wife's necessity that justified an order for alimony pending suit and that Mrs. Slater was in no such necessity, thanks to her national assistance. He conceded that his argument led to the conclusion that no order for such alimony would ever be made in favour of a wife who was receiving an equivalent amount of national assistance, or even one who would be entitled to such assistance if she applied for it. But this, he contended, would be the just solution. For it is more proper that the community should bear the maintenance of a wife pending suit since (1) if the wife is shown at the trial not to have forfeited her right to maintenance, the National Assistance Board can seek reimbursement from the husband of what it has paid to her,[5] whereas (2) if the wife is shown to have forfeited this right (*e.g.*, by her adultery or desertion), the community will be left to bear the loss for which the husband is proved at the trial to have had no legal liability.

The court was not attracted by this ingenious argument. In the first place, although the judgments in *Slater* did not advert directly to this point, the jurisdiction of the Divorce Division in matters of

[1] See Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s. 1 (1) (i).
[2] [1960] 3 All E.R. 217 (C.A.) (Hodson, Pearce and Upjohn L.JJ.); [1961] 2 W.L.R. 685.
[3] [1957] 1 All E.R. 792 (C.A.) (Hodson and Ormerod L.JJ., and Hallett J.).
[4] *Coombs* v. *Coombs* (1866) L.R. 1 P. & D. 218; *Eaton* v. *Eaton* (1870) L.R. 2 P. & D. 51; *Bass* v. *Bass* [1915] P. 17.
[5] National Assistance Act, 1948, s. 43.

alimony and maintenance derives from the practice of the ecclesiastical courts and is not circumscribed by the rules of common law; hence, a husband may exceptionally be ordered to pay permanent alimony or maintenance even to a wife whose misconduct has been proved in a suit for judicial separation or divorce.[6] In the second place, the court felt strongly that the Divorce Division should retain the wide and unfettered discretion which it had always had in awarding alimony pending suit and which found statutory expression in the Matrimonial Causes Act, 1950, s. 19 (1). Wives, even wives who might later be proved guilty of matrimonial offences, should not be subject to the pressure of financial stringency or driven to resort to national assistance, with the temptation this offered to succumb to collusive arrangements. Rather than throw the burden of alimony pending suit upon the National Assistance Board in all cases, it was better that a husband should bear the occasional hardship of supporting a guilty wife pending suit. In the third place, and this seemed to carry decisive weight with the court, there was an overwhelming practical objection to counsel's suggestion and one that had become apparent since the decision in *Sterne*. For assume that the court, as it might very well do, decided that a wife was entitled to alimony pending suit in an amount (say, £3 a week) greater than her national assistance benefit (say, £2 a week) and then, taking into account this benefit, made an award only of the excess (namely, £1 a week); the N.A.B. would then reduce its benefit by £1 a week, and the wife would have to reapply to the court, who would increase its award to £2 a week; the national assistance benefit would again be reduced accordingly, so that in the end the wife would be left with no national assistance benefit but an order for alimony pending suit of £3 a week. It was to break out of this vicious circle, into which certain observations of the Court of Appeal in *Sterne* had mistakenly been thought to lead, that the Registrars' Circular of May 18, 1958, was issued to registrars of the Divorce Division indicating that there is no necessity for them to take into account national assistance when awarding alimony pending suit.[7]

The effect of the decision in *Slater* is to leave the obligation to support a wife where it primarily belongs—upon the husband—and not to shift it on to the N.A.B. alias the taxpayer, even pending the trial of a matrimonial cause in which the wife may ultimately

[6] The power of the ecclesiastical courts to grant permanent alimony to a wife divorced *a mensa et thoro* on account of her own misconduct was not taken away from the Divorce Court by the Matrimonial Causes Act, 1857 (see *Goodden* v. *Goodden* [1891] P. 395; [1892] P. 1 (C.A.)); and the practice is now established that upon a divorce a guilty wife may be granted a compassionate allowance as maintenance (see *Ashcroft* v. *Ashcroft* [1902] P. 270 (C.A.); *Trestain* v. *Trestain* [1950] P. 198; [1950] 1 All E.R. 618n. (C.A.)).

[7] Set out at [1960] 3 All E.R. at p. 220. The registrar is directed to post-date the order of alimony pending suit for fourteen days and to notify immediately the N.A.B. of the making of the order; in the result, the national assistance is not likely to overlap the alimony.

be proved to have forfeited her right at common law to his support. As the N.A.B. assisted in 1959 some 77,000 wives who were failing to obtain support from their husbands,[8] it is fortunate for the taxpayer that the Court of Appeal did not yield to an argument that would have added to the Board's burden the support of those wives who now obtain alimony pending suit.

A more unusual interaction between the husband's obligation to his wife and national assistance is exemplified in *Askew* v. *Askew*,[9] where a former wife applied for family provision to be made for her out of her deceased former husband's estate. Her application was brought under the Matrimonial Causes (Property and Maintenance) Act, 1958, section 3 of which extends to a *former* wife the same right as that which the *widow* has enjoyed since the Inheritance (Family Provision) Act, 1938.[10] The Royal Commission, which advocated the extension,[11] felt that a former wife should be in no worse plight than the surviving spouse, whereas, as the law then stood, unless so fortunate as to have obtained secured maintenance against her former husband, she would have no rights against his estate upon his death, since unsecured maintenance payments were (and still are) necessarily limited to his lifetime.[12]

In *Askew*, the marriage of the first Mrs. Askew with the deceased was dissolved in 1944, and she obtained an order for unsecured maintenance at the rate, eventually, of £377 a year. She did not remarry,[13] but Mr. Askew remarried in 1945. There were no children of the second marriage, and Mr. Askew died in April 1959. By his will he left his estate of £25,000 net to his widow for life with remainder to a nephew and three nieces. The will, which made no provision whatever for the first Mrs. Askew, was proved in August 1959, and the summons initiating the present proceedings was issued in October 1959. The parties reached agreement that the first Mrs. Askew should receive £5 10s. a week out of the estate, but were unable to agree the date when the payments should begin. The disagreement stemmed from the fact that she had been driven to seek national assistance when her maintenance payments ceased upon the death of the deceased. Her national assistance benefit was much less than what her maintenance had been, but counsel for the personal representatives argued that the payment of national assistance to her would justify the court in postponing the commencement of the order for family provision until the date when judgment was given (February 10, 1961) or, at the earliest, the date of the application (October 21, 1959). Counsel for the first Mrs.

8 Annual Report of the N.A.B. for 1959 (Cmnd. 1085), p. 25.
9 [1961] 2 All E.R. 60; [1961] 1 W.L.R. 725.
10 A former husband has a like right under s. 5 of the 1958 Act. See the note on this Act by O. Kahn-Freund in (1959) 22 M.L.R. 50.
11 Report of the Royal Commission on Marriage and Divorce (Cmd. 9678), paras. 522–525; Recommendation No. (61).
12 Matrimonial Causes Act, 1950, s. 19 (3).
13 If she had, she could not have claimed under the 1958 Act, s. 3.

Askew urged that the receipt of national assistance should be disregarded and the order operate retrospectively from the date of death (April 2, 1959).

Marshall J. (who also heard the appeal in chambers in *Slater*) found that section 3 of the 1958 Act gave him no guidance to the proper date from which the payments out of the estate should commence, the section merely conferring upon the former wife a right to claim reasonable provision for her maintenance out of her former husband's estate " after his death." He considered therefore that the section left the court a discretion to order the provision from the date of death or such later date as was warranted by all the circumstances of the particular case. Although the receipt of national assistance by the former wife was a relevant factor, he did not consider that it justified his postponing the effect of his order until some date later than the death. For to do so would mean that the estate reaped a benefit from the fortuitous circumstance that national assistance had been paid to the former wife. In the result therefore the first Mrs. Askew had the double benefit of national assistance and family provision from the date of death until the present judgment or as soon thereafter as the N.A.B. could discontinue its payments to her.

In contrast to *Slater*, the decision in *Askew* may seem to serve ill the interests of the taxpayer, although the overlap of benefits in cases like *Askew* is not likely to add significantly to the total sum presently dispensed in national assistance, over £135m. in 1959.[14] Nevertheless, the back-dating of the family provision order to the date of death gave the first Mrs. Askew an income which could not have been taken into account by the N.A.B. when assessing her need. To prevent double benefit in such cases a possible solution might appear to amend the family provision legislation so as to permit the court, where an application for provision has succeeded, to order the reimbursement of the N.A.B. out of the deceased's estate and to reduce the award of provision accordingly. The objection to this proposal is that it would be tantamount in effect to amending the national assistance regulations so as to allow the N.A.B. to claim reimbursement from one limited category of assisted persons where their circumstances improve. This would be directly contrary to the general policy of the modern law of national assistance which in 1948 resolutely set its face against the old poor law with its notions of relief by way of loan and upon conditions: henceforward, assistance was to be given as an outright grant with no conditions attached, and the regulations for assessing need make clear that a subsequent windfall whether of income or capital gives the N.A.B. no right to claim reimbursement from the assisted person.[15] If we accept the principle but introduce the

[14] Cmnd. 1085, p. 4.
[15] See National Assistance (Disregard of Assets) Order, 1959, and National Assistance (Determination of Need) Regulations, 1948 and 1960.

above proposal as an exception, this immediately raises the question why should successful applicants for family provision be singled out for different treatment from other assisted persons who may benefit by some windfall of income or capital, for example, a beneficiary under a will or intestacy or a "pool" winner [16]? A not entirely convincing answer might be that an award of family provision differs by being a benefit in the discretion of the court, which could be empowered to impose terms like the reimbursement of the Board and the reduction of the dependant's award accordingly. On balance, however, cases like *Askew* are not likely to be sufficiently numerous to warrant a departure from the principle of assistance "without strings."

In the result, although *Askew* allowed an overlap of benefits which was avoided in *Slater*, both cases help to clarify the untidy boundary between public responsibility for the needy and the individual's liability within the family.

L. Neville Brown.

Reconciliation and Condonation

In *Morley* v. *Morley* [1] the question before the Divisional Court was whether a wife is conclusively presumed to have condoned her husband's matrimonial offence by voluntarily having sexual intercourse with him with knowledge of the offence. In this branch of the law a different rule has prevailed for the wife from that applicable to the husband. Thus it has long been established that if a husband has had sexual intercourse with his wife with knowledge of her matrimonial offence, that raises an irrebuttable presumption that he has condoned that offence unless there was actual fraud by the wife.[2] It had previously been thought equally clear that where a wife voluntarily had sexual intercourse with her husband knowing of his offence, that was evidence, but not conclusive evidence, of condonation. In the words of Sir Cresswell Cresswell, the Judge Ordinary, in *Keats* v. *Keats and Montezuma* [3]: "With reference to a wife, to whom a knowledge of her husband's adultery has been brought home, and who has yet continued to share his bed, the rule has not been so strict. The wife is hardly her own mistress; she may not have the option of going away; she may have no place to go to; no person to receive her; no funds to support her; and therefore her submission to the embraces of her husband is not considered by any means such strong proof of condonation as the act of the husband in renewing his intercourse with his wife."

[16] And what of the wife receiving assistance who subsequently recovers arrears of maintenance from her defaulting husband? See article by Weeks (1952) 116 J.P.J. 101.

[1] [1961] 1 W.L.R. 211; 1 All E.R. 236.

[2] *Cramp* v. *Cramp and Freeman* [1920] P. 158, confirmed by the House of Lords in *Henderson* v. *Henderson and Crellin* [1944] A.C. 49, a rather hard case in which the wife immediately repudiated an agreement previously made.

[3] (1859) 1 Sw. & Tr. 334.

The Royal Commission on Marriage and Divorce was plainly perturbed at the effect this rule of condonation might have on efforts at reconciliation.[4] All the members of the Commission agreed that, to encourage efforts at reconciliation, the presumption of condonation should no longer be considered irrebuttable where a husband has sexual intercourse with his wife. A majority of fourteen members would have gone much further than this, and were in favour of permitting a trial period of a month for attempts at reconciliation to be made; during this period nothing that occurred was to constitute condonation.[5] Five members, however, thought that such an arrangement would work unfairly, and indeed the law has always recognised that it would be difficult to justify a rule that permitted a husband to have sexual intercourse with his wife and then disown her during her resulting pregnancy.

Particular difficulty was caused in *Morley* v. *Morley* by the unreported decision of the Court of Appeal in *Baguley* v. *Baguley*,[6] and it was strongly argued that this unreported decision had in fact changed the law, at least to the extent that if the wife were her own mistress, who could have gone away, and had somewhere to go to, her willing consent to sexual intercourse would provide an irrebuttable presumption that she condoned the matrimonial offences of which she knew.

Briefly, the facts of *Baguley* v. *Baguley* were that, on a wife's petition for divorce, cruelty by the husband was found proved, but the Court of Appeal held that the wife had condoned this cruelty after the presentation of her petition. The solicitors of both parties had continuously tried to effect reconciliation between the parties both before and after the presentation of the wife's petition in March 1955. In September of that year the parties met at the office of the wife's solicitors and agreed terms for a reconciliation, according to which they would " let bygones be bygones "; the wife forgave her husband for his past conduct, and it was agreed that when he could find a fresh matrimonial home in a district different from that in which they had previously lived, they would resume cohabitation. Shortly after this agreement, and while the husband was still endeavouring to find a fresh matrimonial home, the parties met at his parents' house and sexual intercourse took place with the voluntary agreement of the wife. In holding that the wife had

4 Cmnd. 9678, paras. 237–243.

5 In *Baguley* v. *Baguley* (*infra*, note 6) Hodson L.J. said: " There has been, no doubt, some talk about the desirability of the law of condonation being altered, in the sense that it might be thought to be desirable that some interval should elapse—some probationary period might be allowed to supervene—before it could be said that the party could not rely on complaints previous to that condonation. But that talk has not resulted in legislation." This was interpreted by Lord Merriman in *Morley* v. *Morley* as a reference to the judgment of Denning L.J. in *Mackrell* v. *Mackrell* [1948] 2 All E.R. 858, 860.

6 (1950), reported only in *The Times*, October 9, 1957. Lord Merriman P. stated that the only copy of the transcript of this case had been obtained from the Bar Library, as to which see *ante*, p. 476.

thereby condoned her husband's cruelty, Hodson L.J. said: "This is not a case in which the wife was not her own mistress, or had not the option of going away, or had no place to go to or no person to receive her, or no funds to support her. There was nothing to explain her submission to the embraces of her husband except her own will. The authorities, as I understand them, have consistently proceeded on the basis that the law of condonation is the same for the wife as for the husband in that sense—namely, that, if she has reinstated him by submitting voluntarily to his embraces without any extraneous circumstance weighing against the inference to be drawn from that submission, she must be held to have condoned the offence." Sellers and Morris L.JJ. appear to have based their finding of condonation on the fact that there had in fact been complete reconciliation between the parties, and that the only reason why they had not resumed married life together was that the husband had not succeeded in finding a fresh matrimonial home in which they could do so.

The facts in *Morley* v. *Morley* were rather different. In both cases there were infant children of the marriage (a factor which appears to have been accorded greater weight in some of the older cases than it receives in this context today). In both cases the wife's complaints were of her husband's cruelty. In *Morley* v. *Morley*, however, the wife was not petitioning for divorce, but had made a complaint of cruelty and wilful neglect to maintain before the magistrates. I venture to suggest that this difference may not be entirely irrelevant to the wife's state of mind.

Shortly before the hearing of her complaint the wife in *Morley* v. *Morley* had left her husband for the third time, taking with her the two elder children of the marriage and leaving behind in hospital the youngest child, a baby. During the hearing of the complaint the parties asked for an adjournment to discuss reconciliation, and the wife subsequently agreed to return to her husband on two conditions, to which he agreed: (i) that he would never hit her again, and (ii) that he would in future travel on his showground business only in the south of England and away from his parents, to whose interference in their matrimonial life she attributed many of their former difficulties.

After the agreement the wife returned to stay with her mother, and some three weeks later, as arranged, she travelled from the south of England to join her husband in Newcastle, expecting him to return with her and the baby to the south of England. Shortly after she had joined her husband in his caravan they started for Goole, which was one of the towns habitually visited on the husband's circuit, and which lay to the south of Newcastle. Sometime during that same morning the husband informed her that he did not intend to transfer his circuit to southern England. Nevertheless she remained with him for two days before returning to the south of England, and during that period sexual intercourse took

place on two occasions. Her own explanation given in cross-examination was: " He was trying to talk me into staying and I was trying to talk him into leaving. He was not prepared to leave his family there and then because he had not got the equipment to leave with."

Despite the decision of the Court of Appeal in *Baguley* v. *Baguley* the Divisional Court found that in these circumstances there had not been condonation by the wife. In the words of Lord Merriman: " In these circumstances it was quite natural for the wife not to treat the husband's repudiation as final, but to try to persuade him to stick to the terms of the reconciliation. It seems to me, too, that as a matter of practical politics she had nowhere else to go, if, as I assume, she still hoped to make the reconciliation effective. The sensible thing, plainly, was to proceed in the caravan with the husband, and the child whom she had not seen for so long, as she had expected to do when she came up to Newcastle." He distinguished the case from *Baguley* v. *Baguley* in this way: " It is plain that the decision in *Baguley* v. *Baguley* was based upon the finding that there had been a complete agreement for reconciliation, so far as that could be effected by word of mouth, and that the sexual intercourse was treated as the ' something ' amounting to a reinstatement said by Lord Chelmsford L.C. in *Keats* v. *Keats* to be necessary to convert imperfect forgiveness by words into condonation, and was therefore conclusive in the circumstances of that case. In this case there was no such agreement," and he concluded, " whatever may be the true explanation of the distinction, the principle that . . . ' the conclusion of condonation by an innocent wife of her husband's previous misconduct is not in all cases so strictly drawn from the fact of subsequent intercourse ' is too well settled to be changed except by legislation."

Cairns J. distinguished the case from *Baguley* v. *Baguley* on the grounds that: " In *Baguley* v. *Baguley* there was complete, unconditional forgiveness. . . . What the Court of Appeal decided was that in these circumstances the intercourse was a resumption of matrimonial relations and could not be dismissed as a mere casual encounter."

The net effect of the two decisions seems to be that the rule with regard to a wife's condonation has not been made more stringent, and it seems unlikely that legislation will be introduced to make it so in the face of a Royal Commission Report unanimously declaring too stringent the rule applying to condonation by a husband. The dangers of discouraging attempts at reconciliation are real, and particularly where the interests of young children are concerned, it is far better that the courts should retain a fairly wide discretion, allowing them to take account of all the circumstances (including the whole of the behaviour of the parties), than that they should fetter themselves with irrebuttable presumptions.

O. M. STONE.

Common Law Corporations and Ultra Vires

The doctrine of *ultra vires* once seemed a logical and indeed inevitable deduction from the nature of a company. Today it is widely felt that the doctrine is productive only of injustice. The Cohen Committee recommended its abolition and no doubt the Jenkins Committee will consider whether to make a like suggestion. It may be then that doubts as to the limits of the doctrine will be rendered academic but in the interim it is interesting to note that further light has recently been shed on the unresolved problem of whether the doctrine applies to common law corporations.

This question was recently considered by Mr. Hudson in his article entitled "Common Law Corporations and *Ultra Vires*." [1] The commonly accepted view is that a common law corporation may bind itself by a contract which is outside the objects in its charter although such conduct might be grounds for the forfeiture of the charter. That view was challenged by Street [2] and Holdsworth [3] amongst others but after a full review of the authorities Mr. Hudson suggested that "the conclusion seems to be that the weight of authority, even if it be only persuasive, and of policy, is in favour of the generally accepted view of the powers of chartered corporations."

It is interesting to note therefore that further persuasive authority for the orthodox view can be found in the speech of Lord Denning in *Institution of Mechanical Engineers* v. *Cane*.[4] The question before the House of Lords in this case was whether the Institution of Mechanical Engineers, a body incorporated by royal charter, was entitled in respect of their occupation of certain premises to exemption from rating under section 1 of the Scientific Societies Act, 1843. In order to qualify for exemption the Institution had to show (a) that it was "instituted for purposes of science, literature or the fine arts exclusively" and if so (b) that it was "supported wholly or in part by annual voluntary contributions." [5] In fact it was held that the Institution did not satisfy either limb of this test, but it is the first limb which is of interest here. In dealing with the purposes of the Institution their lordships were not agreed on the method of approach. Viscount Simonds and Lord Tucker thought that exclusive attention should be given to the purposes set out in the charter but Lord Radcliffe and Lord Denning thought that regard should be had to the present purposes of the Institution.[6] It is the argument of Lord Denning to support this view which is significant in this context.[7]

1 28 *Solicitor* 7.
2 *Ultra Vires*, pp. 18–22.
3 *History of English Law*, Vol. IX (3rd ed.), pp. 55–62.
4 [1960] 3 W.L.R. 978; [1960] 3 All E.R. 715.
5 *Per* Viscount Simonds [1960] 3 W.L.R. at 981; [1960] 3 All E.R. at 717.
6 Lord Reid did not reach a decided view on whether present purposes could be taken into account since he thought the same result would follow whether they were or not: [1960] 3 W.L.R. at 991; [1960] 3 All E.R. at 725.
7 Lord Radcliffe reached the same view on rather different grounds.

Lord Denning pointed out [8] that when the Scientific Societies Act was passed in 1843, Parliament must have had in mind only unincorporated associations or societies incorporated by royal charter since the limited liability company had not yet achieved legislative birth, and indeed it was only comparatively recently that the practice had developed of forming into limited liability companies, societies likely to fall within the ambit of the Act. He said that in applying the Act of 1843 to a limited liability company it was proper to confine one's attention to the memorandum of association since that exclusively determined the company's purposes. The position was different with an unincorporated association where " the purposes of such a society can be changed after its original institution, by the mutual assent of the members, without any record in the formal documents." [9] Similarly in the case of a society incorporated by royal charter as in the present case, the doctrine of *ultra vires* did not apply and therefore the only test which could be applied was the present purposes of the society.

" Such a society, when duly created by the charter, has in law the selfsame capacity as a natural person. The ' divers clauses,' as Lord Coke says, ' are not of necessity but only declaratory, and might well have been left out ': see *Sutton Hospital* case.[10] If it should pursue purposes other than those set out in the charter, its activities are perfectly valid. True it is that any member or any person who is injured by a violation of the charter can take proceedings in the name of the Crown to repeal the charter; but if the Crown takes no such steps, it does not lie in the mouth of the society to say that the purposes which it in fact pursues are *ultra vires* or beyond its powers: see *Riche* v. *Ashbury Railway Carriage Co.*[11] by Blackburn J." [12]

It seems clear that Lord Denning's view as to the non-applicability of the *ultra vires* doctrine to chartered corporations forms an integral part of his reasoning and is not a mere *obiter dictum*. It therefore provides powerful support for the orthodox view even though it does not form part of the *ratio decidendi* of the House of Lords as a whole, since none of the other learned Lords discussed this argument at all.

M. P. FURMSTON.

OLD AND NEW HERESY IN DESERTION

Naylor v. *Naylor*,[1] while giving birth to problems of its own, pronounces the epitaph on an issue which has already been given statutory burial by the Matrimonial Proceedings (Magistrates'

8 [1960] 3 W.L.R. at 995; [1960] 3 All E.R. at 728.
9 [1960] 3 W.L.R. at 996; [1960] 3 All E.R. at 729.
10 (1612) 10 Co.Rep. 23a at 30b.
11 (1874) L.R. 9 Exch. 224 at 263, 264.
12 [1960] 3 W.L.R. at 996; [1960] 3 All E.R. at 729.
1 [1961] 2 All E.R. 129.

Courts) Act, 1960.[2] This was the vexed question whether spouses could be held to be " residing together " within the meaning of that expression in the Summary Jurisdiction (Separation and Maintenance) Acts,[3] even though the circumstances were such as to justify a finding that one of them was in desertion of the other.

In *Naylor* the spouses, having failed to secure the dissolution of their marriage on a petition and a cross-petition both alleging cruelty, continued to reside in the same house, although living completely separate lives after the wife had indicated that she would no longer be a wife to the husband by casting off her wedding ring. The husband ceased to give the wife any money for her own support, but, except for an interval of a few months, continued to make her payments of 30s. a week for each of their two children. During this interval the wife started proceedings before the magistrates on the ground that the husband had wilfully neglected to provide reasonable maintenance for herself and her children. The magistrates dismissed her complaint, finding her to be in desertion, and the wife appealed to the Divisional Court of the Probate, Divorce and Admiralty Division.

In a single and lengthy judgment the court (Lord Merriman P. and Scarman J.) took the occasion to review fully the previous conflicting authorities on the problem of desertion whilst living under the same roof. On the one side were marshalled the decisions of the Divorce Division in *Jackson*,[4] *Smith* [5] and *Wilkes*,[6] of the Divisional Court of that Division in *Angel*,[7] and of the Court of Appeal in *Hopes*,[8] all concurring in the view that desertion could arise between spouses continuing to live under one roof. On the other side stood an array of decisions of the Divisional Court of the Queen's Bench Division—*Evans*,[9] *Wheatley*,[10] *Curtin* [11] and *Hewitt*.[12] The first three cases concerned the enforcement of a justices' maintenance order where the wife remained under the husband's roof, and it was held that the order was unenforceable inasmuch as the wife was " residing with " her husband.[13] The last

[2] See the note of O. M. Stone in (1961) 24 M.L.R. 144.

[3] *viz.* Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (4): " No (maintenance) order shall be enforceable . . . while the married woman with respect to whom the order was made resides with her husband. . . . "

[4] [1924] P. 19.

[5] [1939] 4 All E.R. 533.

[6] [1943] 1 All E.R. 433.

[7] [1946] 2 All E.R. 635.

[8] [1948] 2 All E.R. 920.

[9] [1947] 2 All E.R. 656.

[10] [1949] 2 All E.R. 428.

[11] [1952] 1 All E.R. 1348.

[12] [1952] 2 All E.R. 250.

[13] *Hewitt*, while accepting *Evans*, was concerned with the different point, namely whether there had been a resumption of cohabitation so as to bring a maintenance order to an end under s. 2 (2) of the Act of 1925. Following *Thomas* [1948] 2 All E.R. 98, the court held that the different wording of this subsection (" Where a married woman resumes cohabitation with her husband ") allowed the order to continue in effect if the spouses had resumed residence together under the same roof but not as man and wife.

three of these cases were subsequent to the decision of the Court of Appeal in *Hopes* in which Denning L.J. had challenged the decision in *Evans* and declared roundly that in this context " residing with " meant the same as " cohabiting with " and that the use of the two expressions in different subsections of the Act of 1925 was for stylistic reasons and not meant to point a legal contrast. In *Wheatley* Lord Goddard C.J. dismissed these observations as entirely *obiter*. The Divisional Court, however, point out that they were crucial to the decision of the Court of Appeal and that the Divisional Court of the Q.B.D. had erred in persisting in the misinterpretation of the Act of 1925 after the Court of Appeal's explicit disapproval of *Evans*, the fountain-head of the error.

As the Divisional Court explained, desertion must mean the same thing in whichever jurisdiction it comes in question. If this be granted, it follows that the *Evans* decision might produce the absurd situation of magistrates holding in identical circumstances that the spouses were living separate and apart from each other for the purpose of determining the issue of desertion, but were residing with each other in connection with the enforcement of an order based on that desertion.

Although valuable as setting straight the record, this part of the decision in *Naylor* is now mainly of historical interest. For the Act of 1960, in consolidating and amending the summary jurisdiction of magistrates in matrimonial proceedings, has substituted the unambiguous term " cohabiting " for " residing with " when defining what circumstances will suspend the enforcement of an order.[14]

After this exploration of the previous law, the court expressed their approval of the magistrates' finding that Mrs. Naylor was in desertion. They also agreed with the magistrates that the consequence of this desertion was to deprive the wife of her right to seek maintenance not only for herself but also for her children. They rejected the argument of husband's counsel that the insertion of adultery as an express bar in the Act of 1895 [15] implied that desertion, though a bar at common law, was not to be a bar to complaints under the statute. With respect, so far as concerned the complaint of her own neglect, the argument seems a forlorn one at this distance of time and in the face of a settled practice and such judicial pronouncements as are to be found in *Jones* v. *Newtown & Llanidloes Guardians*,[16] *Price* v. *Price*,[17] *National Assistance Board* v. *Wilkinson* [18] and *N.A.B.* v. *Parkes*,[19] all of which were referred to by the court.

As regards the children, the court agreed with the magistrates

[14] s. 7 (1).
[15] s. 6.
[16] [1920] 3 K.B. 381 at p. 384, *per* Earl of Reading C.J.
[17] [1951] P. 413 at p. 421, *per* Hodson L.J.
[18] [1952] 2 All E.R. 255; [1952] 2 Q.B. 648.
[19] [1955] 3 All E.R. 700; [1955] 1 Q.B. 486.

that the desertion also barred the wife's complaint on their account. For although the wife may be alleging neglect of the children, it is still the wife who is the complainant and the order is her order, not an order for the children.[20] *Naylor* is therefore of much importance in deciding a point left open in *Starkie* (*No.* 2).[21] In the court's view this visiting of the mother's sins upon the children does not cause hardship in practice since the wife who fails under the Summary Jurisdiction Acts may, at the same hearing, bring proceedings under the Guardianship of Infants Acts and obtain maintenance for them *qua* guardian which she could not get *qua* wife.[22] Moreover, in the special circumstances of the present case, the court suggested that, even supposing the wife's desertion did not bar her claim for maintenance for the children under the Summary Jurisdiction Acts, yet the magistrates had a discretion whether or not to make an order, and here the husband had only failed to maintain his children for a few months, since when he was maintaining them regularly and in an amount which the wife accepted as reasonable; accordingly, the magistrates had ample justification to exercise their discretion in the husband's favour and refuse the wife an order.

On the complaint of neglecting the children, it is surprising, to say the least, that the Divisional Court did not refer to its previous decision in *Cooke* v. *Cooke*.[23] In that case Lord Merriman P. and Marshall J. held that, while a husband's reasonable belief in the wife's adultery was a defence to her complaint of wilful neglect to maintain herself, it was no defence to her complaint of wilful neglect to maintain their child.[24] In so holding the President applied the conclusion at which he arrived in *Starkie* (*No.* 2), namely, that " the fact that the wife cannot make out a case of wilful neglect to provide reasonable maintenance for herself does not bar her from proving that there has been wilful neglect to provide reasonable maintenance for her child." As the President indicated in his judgment, *Starkie* (*No.* 2) was concerned with a different situation from that in *Cooke*, since in the former case the wife had disabled herself from establishing failure to maintain herself by reason of a consensual separation which contained no agreement, express or implied, that the husband should continue to maintain her. Nevertheless, the President felt that the reasoning in *Starkie* (*No.* 2) should be applied to the defence of reasonable

20 The court referred to the observations of Lord Merriman to this effect in *Kinnane* [1953] 2 All E.R. 1114.

21 [1953] 2 All E.R. 1519: the wife in this case failed to establish the husband's neglect to maintain her but did succeed in proving his neglect to maintain a child of the marriage, with the result that she was awarded an order in the maximum amount of 30s. a week for the child but only a nominal amount for herself.

22 After May 8, 1961, either form of proceedings is included in the extension of legal aid to civil cases before courts of summary jurisdiction.

23 [1960] 3 All E.R. 39.

24 But as there was doubt about the child's paternity, the case was remitted to the justices for rehearing in the light of fresh evidence.

belief in the wife's adultery. He contrasted the effect of proving adultery by the wife: in that situation the statute would expressly prohibit the making of any order upon the wife's complaint, whether the order were for the maintenance of herself or the child or even for the child's custody.[25]

We are left to wonder how on this point *Naylor* is to be reconciled with *Cooke*. With the greatest respect, *Naylor* leaves the law in a state of confusion and contradiction. That his wife deserted him,[26] or that she has separated from him without any agreement for maintenance,[27] or that he has a reasonable belief in her adultery,[28] these are all defences established by case law where a husband is charged with wilful neglect to maintain his wife. On the other hand, all but the first are no defence to a charge of wilful neglect to maintain one's child. Why should desertion be treated differently from the other two situations and extended to bar the complaint for the child? Adultery, if proved, did this because the statute then in force so ordained. But where neither statute nor precedent compelled, should not the Divisional Court have adopted in *Naylor* the solution favoured by them in *Starkie* (*No.* 2) and *Cooke* and ceased to identify the child with the mother's conduct? The law of negligence long ago discarded such primitive notions of identification,[29] and the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, has done the same in regard to the spouse's adultery.[30] Yet because of the mother's desertion the Divisional Court, apparently contrary to its own reasoning in *Cooke*, chose to reject the claim in respect of the child. That support for the child might be obtained by other proceedings under different statutes was hardly a convincing argument for introducing an inconsistency, if not an injustice, into the case law surrounding the offence of wilful neglect to maintain, especially as most proceedings for this offence come before lay magistrates entitled to clear guidance.

L. NEVILLE BROWN.

DIFFERING APPROACHES TO PREROGATIVE

THAT the Crown is not bound by statute except through express words or necessary implication is a principle established in both

25 See Summary Jurisdiction (Separation and Maintenance) Act, 1895, s. 6. But this is no longer so under the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, where the complainant's adultery (in the absence of condonation, connivance or conduct conducing by the defendant) only excludes any provision for the maintenance of the complainant or for non-cohabitation (s. 2 (3) (*b*)). Nor are orders for the maintenance, care or custody of a child revoked by the complainant's subsequent adultery (s. 8 (2) (*b*)).

26 See *Jones* v. *Newtown & Llanidloes Guardians* and other cases cited above.

27 *Pinnick* v. *Pinnick* [1957] 1 All E.R. 873, following *Starkie* (*No. 2*); so too where a wife is living apart from her husband because of invincible repugnance, as in *Lilley* v. *Lilley* [1958] 3 All E.R. 528.

28 *Chilton* v. *Chilton* [1952] P. 196; *Hartley* v. *Hartley* [1955] 1 All E.R. 625.

29 *Oliver* v. *Birmingham & Midland Omnibus Co.* [1933] 1 K.B. 35.

30 See note 25, above.

Scots and English constitutional law. But the two systems do diverge.[1] In Scotland it has been held that where a statute is for public good there is no antecedent unlikelihood that the Crown will consent to be bound [2]; the Privy Council has held that even in such a case the Crown is not bound, under English law, unless the beneficent purpose of the legislature would otherwise be wholly frustrated.[3] The decision in *Re M.* (*an infant*),[4] however, suggests a leaning towards the Scottish view of the prerogative.

A local authority acting under the Children Act, 1948, had taken a child into its care, boarded the child out with foster parents, and by a resolution vested in itself the rights and powers of parents in respect of the child. The authority later decided to remove the child from the foster-mother, who, however, had the child made a ward of court. The authority, who had begun habeas corpus proceedings, applied for an order that the child should cease to be a ward of court. The order was granted by Cross J. and upheld by the Court of Appeal.

The foster-mother's object was to induce the court to consider the merits of the authority's decision to remove the child from her care. It was therefore argued that the Children Act had not taken away the prerogative of the sovereign as *parens patriae*, exercised through the courts, to supervise the welfare of infants. The question was whether the Act bound the Crown by necessary implication. The Children Act lays down a detailed scheme, giving local authorities powers to take children into their care, and imposing on them the duty of seeing to the welfare of such children, and of keeping such children in their care as long as their welfare seems to the authority to require that course. The authority have a discretion to decide on what is in a child's best interests, but the Act does regulate the way in which its powers are to be exercised. Lord Evershed M.R., citing *Att.-Gen.* v. *De Keyser's Royal Hotel, Ltd.*,[5] held that since the Act provided a clear and comprehensive scheme for the performance of the functions formerly performed by the courts in the exercise of the jurisdiction delegated to them by the sovereign, it must follow that the Act impliedly bound the Crown and that the court could not consider the merits of the authority's decision. Upjohn and Pearson L.JJ. concurred.[6]

It is probably correct that, on a natural and reasonable construction, the Children Act was intended to give local authorities complete discretion in dealing with children in their care. But if the court had sustained its own right to interfere and to review the

[1] *Cf.* Professor J. D. B. Mitchell "The Royal Prerogative in Modern Scots Law" (1957) *Public Law*, p. 304 *et seq.*

[2] *Magistrates of Edinburgh* v. *Lord Advocate*, 1912 S.C. 1085, *per* Lord President Dunedin at 1091.

[3] *Province of Bombay* v. *Municipal Corporation of Bombay* [1947] A.C. 58.

[4] [1961] 1 All E.R. 788.

[5] [1920] A.C. 508.

[6] It was indicated that in matters, such as the marriage of a ward of court, not within the contemplation of the Act, the court might still have jurisdiction.

merits of local authority decisions, it could hardly be said that the scheme of the Act would become unworkable. No doubt the court's interference might cause inconvenience. But the court's right to supervise the welfare of infants is a prerogative right delegated by the sovereign, and in the *Province of Bombay* case it was said that the Crown was only bound by a statute where the purpose of the statute would otherwise be wholly frustrated. There is indeed a difference of approach between *Att.-Gen.* v. *De Keyser's Royal Hotel, Ltd.*, and the *Province of Bombay* case. The latter approach is dogmatic—the Crown's immunity is to be preserved. The former is more flexible, and in this way closer to the Scottish doctrine. Such flexibility is advantageous: the courts may well be reluctant to hold that Parliament in conferring powers on local authorities has intended to subject central institutions of government to these authorities. Nevertheless, if the question is one of the proper construction of drains or siting of buildings, or of the proper treatment of children, it is by no means absurd to suppose that Parliament may intend a local authority to control what is done in its area. The true questions are questions of balance of convenience, proper distribution of functions and the intention of Parliament. The dogmatic approach regards these questions as foreclosed by the doctrine of Crown immunity. But if (as in *Magistrates of Edinburgh* v. *Lord Advocate*) there is held to be no antecedent unlikelihood that the Crown will consent to be bound, or if (as in *Att.-Gen.* v. *De Keyser's Royal Hotel*) the scheme and purpose of the legislation is examined, the way is open to give reasonable consideration to these questions. Certainly it seems that the more flexible approach achieved the correct result in *Re M.*[7]

JOHN T. CAMERON.

THE MEANING OF SURPLUS ASSETS ON A WINDING UP AND THE CAPITALISATION OF UNREALISED RESERVES

THE recent case of *Dimbula Valley (Ceylon) Tea Co., Ltd.* v. *Laurie* [1] presented two difficult problems of construction, namely whether under the plaintiff company's articles of association (i) the preference shareholders were entitled on a liquidation to participate in the accumulation of undistributed profits and (ii) the company

[7] *Re M.* was applied in *Re Baker (Infants)* [1961] 2 All E.R. 250 where Pennycuick J. held that the Education Act, 1944, restricted the court's inherent jurisdiction over infants. The Act entrusts the making of school attendance orders to local authorities. Where such an order is in force, the court cannot scrutinise its merits, and cannot make any contrary direction as to the education of the children concerned. It would be improper to use the court's jurisdiction merely to enforce the order, and such orders can only be enforced by the methods provided by the Education Act.

[1] [1961] 2 W.L.R. 253.

was authorised to capitalise reserves resulting from a revaluation of its fixed assets for the exclusive benefit of the ordinary shareholders. But first brief reference must be made to the facts of the case.

Under article 5 (*b*) of the original articles of association of the plaintiff company, whose share capital consisted of both preference and ordinary shares, it was expressly provided that in the event of a winding up the preference shareholders should have the right " to be paid out of the surplus assets of the company the amount paid up in respect of such preference shares and all arrears (if any) of dividend thereon up to the date of the commencement of the winding up in priority to the other shareholders, and to participate in any further surplus assets of the company after payment of the amount paid up in respect of the other shares rateably with the other shareholders in proportion to the amount paid up " on the preference and other shares.

In 1946, the company adopted a new set of articles, article 140 of which provided that the company might resolve " that any sum not required for the payment or provision of any fixed preferential dividend and (*a*) for the time being standing to the credit of any reserve fund or reserve account of the company, including premiums received on the issue of any shares or debentures of the company, or any sum arising from any operation creating an excess of assets on capital account, or (*b*) being undivided net profits in the hands of the company, be capitalised, and that such sum be appropriated as capital to and amongst the shareholders who would have been entitled thereto if the same had been distributed by way of dividend. . . . " The original article 5 (*b*) was unaffected by the adoption of these new articles, in that it was incorporated by reference into the memorandum.

The company took out a summons to determine *inter alia*: (1) whether the " further surplus assets " referred to in article 5 (*b*) meant in effect the undistributed profits of the company not required to pay the preference dividend and (2) whether the company had power under article 140 to capitalise the reserves resulting from a revaluation of the company's capital assets and to allot the fully paid up shares arising from such capitalisation to the ordinary shareholders. It was conceded that all other reserves could be capitalised in this way.

(1) The first question Buckley J. answered in the affirmative. He held that the crux of the problem was the interpretation to be placed upon the word " divisible " as used in article 85 of the company's articles of association which provided as follows:

> " Subject to the rights of members entitled to shares issued upon special conditions, the profits of the company, after setting aside such sum to a reserve as the directors may decide, shall be divisible among the members in proportion to the amount paid up on the shares held by them respectively . . . . "

Did the term " divisible " mean " that which is to be divided " or

" that which is capable of being divided "? In opting for the latter interpretation the learned judge rejected the contention that the company's undistributed profits were automatically the sole and exclusive property of the ordinary shareholders. He held that the ordinary shareholders' exclusive title to such profits was only contingent, being dependent upon the express declaration of a dividend in their favour, and accordingly he construed the preference shareholders' rights on a winding up under article 5 (*b*) as extending to these funds except in so far as they formed the subject-matter of appropriate dividend resolutions passed before the commencement of the liquidation.

As an arbitrary solution to a difficult and complex problem this ruling may have much to commend it. But to justify it on the authorities would seem to tax human ingenuity rather too severely. The two earlier decisions, which were cited on behalf of the ordinary shareholders and with which the learned judge had to contend, were *Re Bridgewater Navigation Co.*[2] and *Scottish Insurance Corpn., Ltd.* v. *Wilsons & Clyde*,[3] and his ruling would seem to run counter to both of them. As to the latter case, where in an article similar to that cited above the identical term " divisible " was employed and interpreted as meaning " that which is to be divided," the learned judge purported to distinguish this decision from the facts before him on the grounds that " paragraph (*b*) of the original article 5 in the present case makes it clear that the preference shareholders are entitled to participate to some extent in a winding up beyond repayment of their paid-up capital and payment of arrears of their preferential dividend . . . in the *Wilsons & Clyde* case [4] the appropriation to the ordinary shareholders of profits not required to pay preference dividends and the exclusion of the preference shareholders from participation in any surplus assets were complementary provisions. In the present case a parallel position does not exist because of the reference in article 5 (*b*) to participation by the preference shareholders in surplus assets." However, although this distinction undoubtedly exists, the House of Lords in *Scottish Insurance Corpn., Ltd.* v. *Wilsons & Clyde* [4] did not allow its construction of the word " divisible " to rest upon whether or not the preference shareholders were entitled to participate in surplus assets. On the contrary, it was assumed without question throughout the case that prior to a liquidation the ordinary shareholders were entitled to appropriate all the company's profits (subject to the payment of the preference dividend and all arrears thereof), and it was this consideration which weighed with the majority of the House in construing the express provision governing the preference shareholders' rights on a winding up as exhaustive.

2 [1891] 2 Ch. 317.
3 [1949] A.C. 462.
4 *Ibid.*

Moreover, in the *Wilsons & Clyde case* [4] Lord Simonds expressed the view in the course of his judgment [5] that, had the preference shareholders been allowed in the outcome to participate in surplus assets, they would not have been entitled to any funds representing undistributed profits, however inconvenient it might have been to have had to analyse the nature and origin of all the company's assets. It is difficult to see how Buckley J. can derive from this, as he purports to do, any support for the view that where preference shareholders are undoubtedly entitled to rights of participation, prima facie they should be allowed to take the undistributed profits of the company *pari passu* with the ordinary shareholders. Lord Simonds' dictum is clear authority against this proposition.

Now, if the proper construction to be placed on the word " divisible " is indeed " that which is to be divided," the distinction drawn by Buckley J. between the article in question and the comparable provision in *Re Bridgewater Navigation Co.*[6] cannot stand. For the latter article was similar in all material respects except that the expression " shall belong to . . . and be divided " was used in substitution for " shall be divisible," and if the interpretation of " divisible " here contended for is correct nothing can turn on the verbal differences between the two terms. Their meaning is identical. *Re Bridgewater Navigation Co.*[6] is direct authority against Buckley J.'s decision, and its force is unimpaired by the fact that in this case originally only one class of shares existed. For, after the preference shares came to be issued, the court had little hesitation in saying that as a matter of construction the ordinary shareholders were entitled under the original article to all the undistributed profits not required to satisfy the preference dividend or any arrears thereof, and it is difficult to see why exactly the same interpretation should not apply to the equivalent article in the *Dimbula* case.[7]

A final criticism of Buckley J.'s construction of the articles before him so far can be levelled at the way in which he differentiates between the rights of the ordinary shareholders before and after the commencement of a winding up. For, although he concedes that the ordinary shareholders are in a position prior to liquidation to appropriate all the surplus profits either directly by way of dividend payments or indirectly by a capitalisation, *i.e.*, by a declaration of dividend and an appropriation thereof in satisfaction of a bonus issue, nevertheless, when once a winding up has started, under Buckley J.'s ruling the ordinary shareholders will only take *pari passu* with the preference Such a result is unsatisfactory in principle. Accordingly, on the first point that Buckley J. had to consider it is submitted that in the face of the authorities and from the standpoint of logical consistency his decision cannot be supported.

(2) Buckley J. went on to consider the further question raised by

[5] At p. 488.
[6] [1891] 2 Ch. 317.
[7] [1961] 2 W.L.R. 253.

the originating summons, namely the effect of article 140. Counsel for the preference shareholders placed considerable reliance on the difficult case of *Westburn Sugar Refineries, Ltd.* v. *I.R.C.* [8]

There the plaintiff company in 1948 undertook a revaluation of its capital assets with the result that the excess of £155,910 over book values thereby disclosed was transferred to capital reserve; and in the next year £152,250 of this sum was capitalised. In 1950 the company reduced its share capital, confirmation thereof being eventually obtained from a decision of the House of Lords.[9] At no time was the propriety of the capitalisation of 1949 in doubt. Subsequently, further litigation ensued to establish whether the company's reduction of capital involved the disbursement of a " distributable sum " falling within section 31 of the Finance Act, 1951. The issue came before the Scottish Court of Session, which had little hesitation in finding against the Revenue, holding that an unrealised capital profit was not a " distributable sum." In the course of their judgments Lord Clyde [10] stated as a separate ground for his decision that " in the case of an appreciation which is neither realised nor immediately realisable, it would be illegal to distribute the surplus," [11] and Lord Sorn similarly observed [12]: " In my view, capital profits are not distributable until they are realised."

This rejection, however, of a company's right to distribute unrealised capital profits was (decisively) repudiated by Buckley J., the various considerations leading to this conclusion being as follows:

(i) If the reserve fund arising from a revaluation of capital assets could not be distributed, it likewise could not be capitalised,[13] and such a result conflicted both with the generally accepted view of the law and with the express course of action adopted by *Westburn Sugar Refineries, Ltd.*[14] Accordingly, such a reserve fund must always be both available for distribution and capable of capitalisation.

(ii) The fact that the reserve in question, being an unrealised profit, was dependent for its existence upon a valuation should not (provided the valuation was itself not open to criticism) be allowed to prejudice the foregoing conclusion, in that all trading concerns having an opening and closed stock relied to a varying extent upon the valuation placed upon such stock in arriving at their profit and loss account. It was a difference of degree rather than of principle to calculate capital profits by comparing their estimated with their book value.[15]

8 [1960] T.R. 105; 1960 S.L.T. 297.
9 See *Ex p. Westburn Sugar Refineries, Ltd.* [1951] A.C. 625.
10 Citing *Palmer's Company Law*, 20th ed., at p. 645.
11 See p. 107.
12 At p. 109.
13 Share premium accounts and capital redemption reserve funds, though normally non-distributable, can, however, be capitalised; but here the position is governed by statute. See Companies Act, 1948, ss. 56 (2) and 58 (5).
14 [1960] T.R. 105; 1960 S.L.T. 297.
15 Moreover, sometimes it might be difficult even to distinguish between realised and unrealised capital profits See [1960] B.T.R., p. 435.

(iii) Provided that the company had fluid assets available for payment of dividends, there could be no objection to using such funds for this purpose and to preserving the proper balance of the company's balance sheet by writing up the value of unrealised fixed assets. For it was not incumbent upon the company to keep any part of its assets in any particular form.

Moreover, although this additional point was not put forward by Buckley J., it is difficult to disagree with the assertion made by Lord Sorn in *Westburn Sugar Refineries, Ltd.* v. *I. R. C.*[16] (and rejected by his brethren on the bench) that, in so far as any excess over book values resulting from a revaluation was due to unnecessary provisions for depreciation, the company's profit and loss account must be increased accordingly, and that to this extent at any rate the excess must without question belong exclusively to the ordinary shareholders.

It must be appreciated that in reaching the conclusion that he did Buckley J. was not saying that a distribution of unrealised capital assets was necessarily from a commercial standpoint prudent. Moreover, many, if not most, accountants would deplore the decision, and it may well have been their testimony in the *Westburn Sugar Refineries* case [17] that induced the Court of Session to arrive at a conclusion that cannot legally be supported. But, however much the practice of distributing realised capital reserves may in some quarters be deplored,[18] in the absence of statutory reform the position cannot now be reversed, and the same must hold true equally of unrealised capital profits.

The consequence of Buckley J.'s support for the distributable character of unrealised capital reserves, *i.e.*, distributable among the ordinary shareholders, was to render such funds capable of being capitalised for the exclusive benefit of this same class, provided, of course, that the preference dividend and any arrears thereof had been paid.

Buckley J.'s decision is to be welcomed in so far as it specifically rejects the views stated in the *Westburn Sugar Refineries* case [17] and establishes unequivocally the principle that all capital profits whether realised or merely realisable are always available for distribution or capitalisation. But the learned judge's interpretation of article 5 (*b*) read in the context of the other original articles of the company cannot, it is submitted, be supported.

D. G. Rice.

Does a Documentary Credit Constitute Absolute Payment?

"The large and important part which letters of credit play in modern commerce restrains me from expressing my opinion on

[16] [1960] T.R. 105 at pp. 110, 111. See also *Stapley* v. *Reid Bros., Ltd.* [1924] 2 Ch. 1.

[17] *Supra.*

[18] In this connection see Younger J. in *Wall* v. *London & Provincial Trust, Ltd.* [1920] 1 Ch. 45 at p. 56.

many of the points argued. The system should be kept as free as possible from technicalities and from unnecessary judicial dicta which may embarrass business dealings in future." [1] It is to be regretted that this dictum of Bankes L.J. did not guide the High Court of Australia in *Saffron* v. *Société Minière Cafrika*.[2]

In this case a Japanese bank opened an irrevocable but unconfirmed documentary credit in favour of the plaintiffs. The letter of credit called for a full set of bills of lading, blank indorsed, covering a shipment of chrome ore. The plaintiffs failed to present the required documents and the bank refused to accept the faulty documents tendered. The defendants, the consignees, accepted the goods. The plaintiffs thereupon demanded payment of the price of the goods from the defendants. Upon the defendants' refusal to comply with this demand, the plaintiffs brought an action against them. The defendants, in their defence, contended, *inter alia*, that their procuring an irrevocable unconfirmed credit in favour of the plaintiffs constituted an absolute payment. They argued, accordingly, that the opening of the letter of credit discharged their duty to pay the price of the goods. The case came, finally, on appeal, before the High Court of Australia.

The court had to decide one question only, namely whether an irrevocable but unconfirmed letter of credit is taken by its beneficiary in full payment of the price of the goods. The court answered this question negatively.[3] So far the decision corresponds with the opinion of most courts and scholars. In the U.S.A.,[4] France [5] and Germany [6] it is common ground that an irrevocable credit does not constitute payment. The same opinion finds considerable support in English law as well.[7]

The actual decision is unexceptionable. But, the court attempted to settle a further problem. Whether a documentary credit constitutes absolute payment or not depends, according to the High Court of Australia, on the nature of the credit, which may

1 *Donald H. Scott & Co.* v. *Barclays Bank, Ltd.* [1923] 2 K.B. 1 at p. 10.

2 (1958–59) 100 C.L.R. 231; noted: A. H. Hudson, "Payment by Letter of Credit" (1960) 23 M.L.R. 689. See also A. G. Davis, "Recent Developments in the Law of Commercial Credits" [1959] J.B.L. 323.

3 At pp. 243–244.

4 See Uniform Commercial Code (1958), section 2–325 (2), and the following cases: *Greenough* v. *Munroe* 53 F. 2d 357 at p. 364 (1931); *Re Canal Bank & Trust Co.'s Liquidation* 178 La. 575; 152 So. 297 at p. 300 (1933), *Bank of United States* v. *Seltzer* 233 App.Div. 225; 251 N.Y.S. 637 at p. 644 (1931); *Lamborn* v. *Allen Kirkpatrick & Co. Inc.* 288 Pa. 114; 135 A. 541 at p. 543 (1927). On the other hand there are American dicta saying that the bank's accepting a draft drawn under a letter of credit discharges the buyer: see *Ornstein* v. *Hickerson* 40 F.Supp. 305 (1941); *Vivacqua Iramos S.A.* v. *Hickerson* 193 La. 495; 190 So. 657 at pp. 658–659 (1939).

5 See J. Stoufflet: *Le Crédit Documentaire* (1957) at pp. 157–158.

6 See Dr. H. Reichardt: "Das Akkreditiv," (1926) 88 *Zeitschrift für das Gesamte Handelsrecht und Konkursrecht* 1 at p. 18.

7 See A. G. Davis, *The Law Relating to Commercial Letters of Credit* (2nd ed., 1954), pp. 45 *et seq.*, and *Hindley & Co.* v. *Tothil Watson & Co.* (1894) 13 N.Z.L.R. 13 at p. 23.

be revocable, irrevocable but unconfirmed, or irrevocable and confirmed. The court first suggests, quite correctly, that a revocable credit cannot constitute payment.[8] It then says that " a provision for payment by irrevocable and confirmed letter of credit which, in words taken from Gutteridge and Megrah, *The Law of Bankers' Commercial Credits* (1955) at page 13, is ' an absolute undertaking by the banker to honour all drafts complying with the terms of the instrument creating the credit, subject only to limitations as to the amount [9] and period of time for which it is to be available ' might perhaps not unreasonably be regarded as a stipulation for the liability of the confirming bank in place of the buyer." [10]

This suggestion is, with respect, untenable. In the first place it conflicts with the otherwise universal opinion that an irrevocable letter of credit, whether confirmed or unconfirmed, does not constitute payment.[11]

In the second place it is hard to understand why, in principle, an irrevocable but unconfirmed letter of credit should differ from an irrevocable and confirmed credit as far as the present problem is concerned. In an irrevocable unconfirmed credit a banker promises a consignor of goods to pay a certain amount of money or to accept a draft for the same amount upon the consignor's tendering several documents. The same promise is given to the consignor in an irrevocable and confirmed credit. There is only one distinction between the two instruments. In the irrevocable and confirmed letter of credit a second banker adds his own promise to that of the issuing banker. The second promise is in similar terms to the promise of the issuing banker. Thus the difference between an irrevocable unconfirmed and an irrevocable confirmed credit is merely quantitative. In the first the consignor gets a promise given by one bank. In the second the same promise is given by two banks. It is hard to see why a promise given by A should not constitute an absolute payment while the same promise given by A and B should be so considered. One can certainly not generalise about the intention of the parties in this respect. It is true that an additional promise given by a second bank gives further security.

[8] See authors quoted in notes 5, 6 and 7. The American section quoted in note 4 applies to revocable credits as well.

[9] The amount must not, necessarily, conform with the amount of the contract of sale. A letter of credit can be opened for part of the price only. Thus in the *Saffron* case the letter of credit covered only 80 per cent. of the price of the goods. Also an irrevocable confirmed credit can be opened for part of the price of the goods only.

[10] At pp. 243–244.

[11] None of the authors quoted in notes 5, 6 and 7, *supra*, draws any distinction between an irrevocable confirmed and an irrevocable unconfirmed credit as far as the present problem is concerned. All of them think that no irrevocable credit, whether confirmed or unconfirmed, constitutes payment. Neither does section 2–325 of the Uniform Commercial Code draw such a distinction. It states that no letter of credit is taken in payment by the consignor. In England Denning L.J. (as he then was) observed in *Trans Trust S.P.R.L.* v. *Danubian Trading Co., Ltd.* [1952] 2 K.B. 297 at p. 305 that a confirmed credit is something different from payment.

It does not follow that a consignor is always willing to discharge a consignee for a promise of two banks. Moreover, sometimes a promise given by a single, first-rate bank can furnish better security than a promise given by one second-rate bank and confirmed by another second-rate bank.[12]

It is therefore submitted that the High Court's dictum that irrevocable confirmed credits may amount to absolute payment is inconsistent with the authorities that there are and contrary to principle, and that it ought not to be followed.

E. P. ELLINGER.

[12] As to the classification of irrevocable credits into confirmed and unconfirmed credits see Davis, *op. cit.*, p. 32 *et seq.* See also section 5 of the Uniform Customs and Practice for Commercial Documentary Credits (1951 Revision) edited by the International Chamber of Commerce.

REVIEWS

The Roots of Crime. By Edward Glover, M.D., LL.D. [London: Imago Publishing Co., Ltd. 1960. xiii and 422 pp. (with indices). 45s. net.]

This is the second volume of the author's Selected Papers on Psychoanalysis, and, as its title indicates, it contains a number of addresses and articles on psychological aspects of the criminal law and its administration. Most of these have already been published in learned periodicals, that on Psychiatric Aspects of Capital Punishment, for example, in this *Review*, and it will undoubtedly be a great help to students of the subject to have this rich store of material conveniently gathered in one volume. But several of the chapters, among which are some of the first importance, appear to have been specially written for the occasion, so that those already in possession of the earlier material cannot afford to dispense with this book.

Since the death of Ernest Jones, Dr. Glover has been the leading exponent of the philosophy and methodology of Freud in this country: a much sought-after practising psychoanalyst, he has never ceased to make important contributions to the literature of his subject, and in particular perhaps to those aspects of it which are concerned with the elucidation of criminal activities and the rehabilitation of delinquents. He explains in his Preface that his interest in pathological crime was first aroused about 1911 by James Devon, a prison medical officer who was something of a pioneer in the subject, though his book, *The Criminal and the Community* (1912), has been largely neglected. When Dr. Glover began his work as a practising psychoanalyst he found this interest heightened by some of the observations pertinent to the subject of his master, Freud, which were confirmed by his direct experiences with patients. Thus he points out that "the manifestations of unconscious guilt in both normal and neurotic persons" do in his experience give rise in a number of cases "to an unconscious need for punishment and hence to criminal conduct."

Already then in 1922 we find the young psychoanalyst addressing a Summer School for Women Magistrates on the title-subject of his present volume, "The Roots of Crime," and when as a result of the well-known investigation carried out for the British Medical Council by Dr. Grace Pailthorpe it was decided by a number of those most interested to found the Institute for the Scientific Treatment of Delinquency and to set up a psychopathic clinic, it is not surprising to find Dr. Glover playing a leading part in the enterprise.

And so he has continued. The clinic, now the Portman Clinic and part of the National Health Service, was the first institution of its kind in the world. Dr. Glover has been from the beginning and is today chairman of the Institute's Scientific Committee, and not the least interesting of his contributions to this book is an illuminating historical description of its work; while a great deal of the material which provides the basis for his most important theorising is clearly derived from the work of the Clinic, or from the researches carried on under the auspices of the Institute, now called the Institute for the Study and Treatment of Delinquency.

Lawyers and others who are concerned to understand the problems of delinquency may wonder whether a volume so particularly based upon a psychoanalytical approach and by an author so formidably equipped will not be above their heads. On the whole I have not myself found it so. Many of the papers included were originally addressed to lay audiences, and even when, as in the chapter on the Criminal Psychopath, Dr. Glover is at his most

technical, the direct clarity of his language enables the reader to follow well enough the purpose and trend of the discussion. Certainly the material is of such importance that no one interested ought to allow himself to be deterred by considerations of this kind.

Dr. Glover's subject is essentially "forensic psychiatry." This is presumably a branch, possibly the leading branch, of "forensic medicine," the importance of which certainly goes back before the M'Naghten Rules. The new psychology of Freud, Jung *et al.*, and the methods of psychoanalysis have however during the present generation given it a completely new orientation, and one of Dr. Glover's main objectives is "to chart the existing sphere of its influence." He does not conceal his view that "the most fundamental approach to crime is that of psychoanalysis." At the same time he fully appreciates the practical value of other lines of attack, even from time to time displaying a sympathetic understanding of the point of view of the rule-of-thumb criminal lawyer whom it must be admitted he is more generally found criticising in a quite ruthless manner. The work of the I.S.T.D. in which Dr. Hermann Mannheim, and, at one time, Christmas Humphreys, Q.C., have taken a prominent part has been broadly based in law and sociology, and this "multidisciplined" work receives the commendation of the author of this book. Indeed the problem of the criminal offender is perhaps the only one where disciplines as important to society as the law, sociology and medical psychology meet on equal ground, and Dr. Glover's recognition of this in his important section on "Team-Research in Delinquency" is typical of his empirical and broad-minded approach to his subject.

Dr. Glover is under no illusions as to the position of psychiatry, and particularly of psychoanalysis, in the estimation either of the general public or of the judiciary. There is he points out in society an "unconscious need for crime" and a "social compulsion to punish infractions of social codes." This is unlikely to disappear in the foreseeable future. Indeed the social arrangements to which this has given rise, in effect the administration of the criminal law, have, he admits, produced a "stability" which is of basic value, even while he deplores the "scapegoat system whereby the criminal is made to pay for the unconscious criminal tendencies that lie dormant in the community."

Process of enlightenment is however going on which it is one of the main objectives of this volume to further. Thus Dr. Glover points with justifiable pride to the increasing use which is being made by metropolitan magistrates of the services of the Portman Clinic. These men who, after all, spend their lives dealing with criminals have, at the initiative of a remarkable personality among their number, Mr. Claude Mullins, showed themselves ready to give the services of the clinic a trial run, and have been sufficiently impressed with the results to make use of it more and more. Dr. Glover contrasts this with the superior attitude of most Courts of Quarter Sessions where the Chairman or Recorders are after all generally complete amateurs, and even of High Court judges who are little if any better, since for most of them their criminal work is a minor and unpleasant excursus from the handling of civil litigation, and one for which only a man of exceptional understanding or sense of duty is ever at pains specially to equip himself. The present volume is accordingly "strongly influenced by two needs, first of all to present psychoanalytical views on pathological crime in a form which will appeal to readers who are interested in social developments, and second, to orientate in the psychoanalytical approach such workers in delinquency as are devoted to other forms of scientific discipline."

The volume opens with the "Roots of Crime," the address already mentioned as having been given in 1922 to women magistrates, then for the first time beginning to take their part in the administration of criminal justice. This would have been worth reproducing if only for two episodes which occurred in connection with its delivery: the one, the walk-out of the late Lord Olivier with his remark "never have I listened to such outrageous nonsense,"

and the other, the equally typical statement of the chairman of the meeting, Mrs. St. Loe Strachey, a sister of Beatrice Webb, who on hearing Dr. Glover say that by "adult social standards the normal baby is for all practical purposes a born criminal" could not restrain herself from interjecting, "But doctor, the dear babies. How can you say such awful things about them?"

The remarkable thing about this lecture however is that it contains in germ the substance of all the rest of the book. Indeed as Dr. Glover says in an introductory paragraph, "Although the facilities for treating delinquent cases have increased very greatly—comparatively few fresh discoveries have been made regarding the causes, treatment, and prevention of crime. Most of the work has consisted in the more systematic application to the problem of principles that had already been laid down by psychoanalysts thirty-five years ago." Dr. Glover would certainly say that in most cases of pathological crime "the dear babies" before they have reached the age of five or six have already been predestined to their future conflicts with the law. These are the children in whom their parents for one reason or another have not been able to make the necessary basic adjustments for life in modern society: "Crime is part of the price paid for the domestication of a naturally wild animal."

It is indeed understandable that Lord Olivier should have walked out. He met at that meeting, no doubt for the first time scientifically based, the revolutionary doctrine propounded by Samuel Butler that crime stems from sickness of the mind. He was himself one of the original group of Fabian socialists, an adherent of the doctrine that crime largely originates in the inequalities of contemporary society, a view which Dr. Glover might well say is not without a certain validity. But the Samuel Butler hypothesis, even when buttressed as it is in this book by formidable empirical argument, makes even slower headway than the economic one. It is of an even more fundamental character, and man is inevitably attracted to superficial explanations of social phenomena which are congruent to the social patterns in which he has been brought up and which make no demands on his imagination.

After this introductory address, Chapter 1 follows with a history of the psychological investigation and treatment of delinquency in Great Britain, starting significantly in 1912 with Dr. Devon's book, and coming right down to 1959. Dr. Glover does not confine himself to history, in which the work of the I.S.T.D. naturally figures largely, but interjects many comments of a scientific nature, as in his remark (p. 75) that "the wells of human motivation" will only be "tapped" by applying psychoanalytical methods "not only to criminal data but to data drawn from normal groups." There is here, too, much ruthless criticism of official institutions. I have already referred to his strictures on the judiciary; his attack on obscurantism in the Home Office is even more searching, though he admits that of recent years under Mr. R. A. Butler there has been a significant change of outlook in that department.

For the ordinary reader, Chapter 3 on the general problem of the diagnosis and treatment of pathological delinquency will probably be the most rewarding, since it is here that Dr. Glover unfolds in language sufficiently clear of technical jargon the detailed experimental methods the application of which to the cases of individual delinquents will, he contends, eventually produce a body of knowledge which will not only throw a flood of light on the causes of criminality, but also will place at the disposal of the courts an instrument for the treatment of delinquents which will revolutionise the administration of the criminal law. Indeed from a fairly detailed use of material from the I.S.T.D. he is able to argue with some show of justification that treatment can be given, even in the rough and ready conditions of the London petty criminal courts, with a fair measure of success.

This chapter is followed out on a much more technical plane by a detailed investigation of the problem of the criminal psychopath, which is at the very heart of pathological crime. In this he deals with diagnosis, etiology and treatment. With only the layman's capacity for appreciating this intensely

scientific discussion I am nevertheless left with the impression that no more important contribution to this exceedingly difficult subject has so far appeared. Certainly Dr. Glover goes a long way towards demonstrating that the generally held view that criminal psychopaths must be regarded as incurable is by no means true. His material on this again is largely drawn from the records of the Portman Clinic: even if his opponents succeed in whittling away some of the successes which he claims have been achieved in that institution, I have the feeling that a hard core of success will remain, and will remain to point the way to encouraging developments in the future.

Section V on Sexual Disorders and Offences is divided into three parts. The first of these on Social and Legal Aspects of Sexual Abnormality has already appeared [1] and provides an introduction to the important "Problem of Male Homosexuality," an original contribution which throws a flood of light upon this intensely contemporary problem. Dr. Glover provides much material in support of the view which is becoming more and more widely, if reluctantly, held by educated people that homosexual tendencies, especially in youth, are extremely widespread, and of course in both sexes. He shows that these originate in extreme youth in an "unconscious homosexual phase." After a period of regression this reappears, still for the most part unconscious, in adolescence. So far from this being a deplorable fact in human existence it is, in his view, one of the most creative and fertile, being "responsible for many important and constructive developments both individual and social." It follows in his contention "that the existing standpoint of British law, *viz.*, that manifest homosexuality whether it be practised in public or in private is to say the least of it a socially biased and sectional view of a larger problem which strikes to the roots of human organisation, enters into every human relationship, provides the energy for many of man's cultural activities, (and) oils the wheels of human society."

This does not of course mean that there are not many aspects of manifest homosexuality which are not gravely damaging to society, and it is the great virtue of this chapter that Dr. Glover discusses them and probes into them in an objective and scientific manner, so often completely lacking in such writing. One of the points which he brings out clearly, and which should cause every judge or magistrate handling a criminal cause of this type to pause and reflect, is "a difficulty which confronts the clinical criminologist at every turn." This is, that when he is called upon as a witness to depose to the "pathological changes" in the accused to which his "offence may be attributed" "he is compelled by his professional standards" to reply that "he has detected no abnormality"—how could he do otherwise when in his view a large part of society is constituted in exactly the same way?

This chapter strikes one as hardly less significant than that on the criminal psychopath.

The final chapter in this section of the book in which Dr. Glover discusses "the psychopathology of prostitution" has also been published by the I.S.T.D. It originally appeared in 1943 and it is most interesting to read it again against the background of the Wolfenden Report and the Street Offences Act, 1959.

The three chapters on Clinical Research which form Section VI of the book have all been published in the *British Journal of Delinquency*. Space does not permit me to do more than refer to them, though they contain much of interest. The same may be said of Section VII—"Socio-Legal"—which contains the short but important "Concept of Recidivism," and a chapter on the "Prevention of Pathological Crime."

Under the heading of Obiter Scripta, Dr. Glover winds up his book with a number of short notes which he has contributed from time to time to the *British Journal of Delinquency*.

C.

[1] It is obtainable as an I.S.T.D. pamphlet.

PIONEERS IN CRIMINOLOGY. Edited by HERMANN MANNHEIM. (*The Library of Criminology*, No. 1.) [London: Stevens & Sons, Ltd. for the Institute for the Study and Treatment of Delinquency. 1960. xii and 402 pp. (with index). 45s. net.]

THIS is the first volume of a new series of works on criminology which is to appear under the auspices of the Institute for the Study and Treatment of Delinquency: it will be recollected that the Institute's *British Journal of Delinquency* (recently rechristened the *British Journal of Criminology*) has been a pioneer British periodical in this field of study. The volume is in fact a republication of an American book in which a number of papers which originally appeared in the *Journal of Criminal Law, Criminology, and Police Science* have been made available to a wider public. Although there are no doubt good reasons for this choice, it seems rather a pity that some rather more distinctive British work, such as the recently published *Roots of Crime* by Edward Glover, was not chosen to start the series off.

However, in the absence of any effective history of criminology this work will no doubt meet a very real need, and it is understood to have been a success in America. The lives and work of seventeen men of eminence who in one way or another were concerned with the problems of criminality and the treatment thereof, ranging from the eighteenth-century Beccaria to Bonger, who died in 1940, are described and discussed separately. Among them there are nationals of no less than eight different countries (nine if we count England and Scotland separately): so that it may be said that the selection is catholic; incidentally the United Kingdom, where criminology has been the Cinderella of the Social Sciences, takes first place with five out of the seventeen. But this analysis by nationality is a little misleading, because it entirely fails to reflect the predominance of the U.S.A. in the field of modern criminology, a failure due to the fact that the work of living criminologists is not dealt with.

As is inevitable in a volume of this kind, the value of the different chapters varies a great deal: some are serious and scholarly studies, among which we may mention in particular Dr. Wolfgang's detailed study of Lombroso which, with sixty pages of text, is more than twice as long as any other chapter, except for Dr. Mannheim's thoughtful Introduction. Justice Barry's Maconochie, not just a synopsis of his full-length study, Peter Scott's Maudsley, Professor Margaret Vines' Tarde, Professor Francis Allen's Garofalo, and Professor Sellin's Ferri also appealed to me. Some of the chapters are very short and rather superficial, and these not always by the least distinguished contributors. Thus von Hentig's eight pages on Aschaffenburg really tell us very little about the work of that remarkable man, though they do bring out his personality. Of Chief Justice Doe, of New Hampshire, as a criminologist there is probably very little more to be said than appears in the nine pages printed here (from the pen of his successor, Kennison C.J.), remarkable lawyer as he was: though indeed it is claimed in this chapter that Doe "is the only judge who can truly be denominated a pioneer in criminology." Reading Professor Geis' chapter on Bentham leaves one wondering why the great utilitarian ever made an impact on penology; since there is not a page which does not criticise him severely, and it is difficult to discover here that he made any contribution to the subject other than his idea of the panopticon which does not earn him many marks either!

A series of chapters in a periodical tends to be got together by the editor according to who is available to write, rather than on the basis of a scientific selection of the subject-matter. Thus there are a few obvious gaps such as John Howard and von Liszt. Several of the men whose work is discussed were hardly criminologists or, if they were, that side of their activities is but little brought out in these chapters. I have already referred to Chief Justice Doe who is famous in the annals of criminal law for his rejection of

the M'Naghten Rules in favour of the New Hampshire Rule.[1] Doe was influenced by the views of Dr. Isaac Ray, an alienist who was much concerned with problems of forensic medicine, particularly that of insanity, and whose work is sympathetically discussed in this volume by Dr. Overholser, a well-known American psychiatrist: it was, however, distinctly peripheral to what we should now regard as criminology.[2] The chapter on Haviland, too, is rather unexpected, though it was certainly well worth inclusion. Haviland was the architect of the famous Cherry Hill prison in Philadelphia. This, or rather the improved version of it at Trenton, N.J., became a model throughout the world, and the prototype of most of the existing prisons in this country. Haviland was an Englishman and his master, Elmes, who was interested in prison architecture, had been much influenced by the views of John Howard and, of course, by Jeremy Bentham, an influence which he passed on to his pupil in good measure. Again, the Austrian, Hans Gross, was primarily an investigating magistrate and even Durkheim's views on punishment were very much a by-product of his sociological and economic studies; with him, criminology was certainly peripheral.

Criminology, as we now know it, is indeed a very modern science; only its penological aspects had been much studied before the rise of the Italian school and even so not in a very scientific manner. This justifies the three long chapters on Lombroso, Garofalo and Ferri which at first sight might appear out of proportion. They were, of course, all original thinkers and these chapters bring out the fact that there were major divergencies in their points of view. However much Lombroso may have been discredited, and it is good to have in this volume a chapter on his most effective critic, Dr. Charles Goring, it can hardly be gainsaid that his influence has been germinal and that some of his contributions are basic to modern criminology, such as his rejection of the doctrine that the punishment should fit the crime; he maintained rather that it should be adjusted to the criminal. If anyone can be described as the father of the science, surely it is he. And in spite of his propensity for chasing hares, phrenological, spiritualistic and others, how surely he kept his balance on the essential of penological science—"the first object of punishment should be the protection of society, the second is the improvement of the criminal." Nor did his mind atrophy with advancing age, and his "later concern with psychological differences among criminals has been the basis for much contemporary research."

The final chapter on "the historical development of criminology," by Professor C. R. Jeffrey, while it contains much that is stimulating and more that is interesting, also advances many dogmatic assertions and unsupported generalisations which are out of place in a work of scientific pretension. Dr. Mannheim whose Introduction is, I think, the most valuable contribution in the book, does not conceal his disapproval of much that Professor Jeffrey writes. Dr. Mannheim's chapter is also largely historical. He wisely selects a small number of the more important aspects for analysis and discussion. Of these, the matter to which he gives most attention is positivism; first of all its meaning in the history of social science and then its place in international criminology. A good deal of nonsense has been written about positivism by people who ought to have known better, and it is a pleasure to read Dr. Mannheim's remarks, at once penetrating and robust, about its essential qualities, and the influential part which it has played in sociological thought during the past century, not least, of course, in the domain of penology.

C.

[1] See my review of *The Urge to Punish* by Henry Weihofen in (1958) 21 M.L.R. 700.

[2] See *ibid.*

ADVOCACY, ITS PRINCIPLES AND PRACTICE. Second edition. By R. K. SOONAVALA. [Bombay: N. M. Tripathi Private, Ltd. 959 pp. £2 10s. net.]

"THIS most readable and interesting book," said Lord Birkett in a review [1] of the first edition, "will give pleasure to all lawyers who read it." It is not to be assumed, however, that Lord Birkett read through the whole of the nine hundred and forty pages which Mr. Soonavala had put together; he must have dipped into them here and there, and it is certainly very easy to have a lucky dip. Long excerpts, quoted verbatim, from the records of famous trials (*e.g.*, Crippen, Tichborne, Vaquier, Rouse, Mrs. Maybrick) and others less well known account for a large part of the text and are certainly quite interesting. Another large part of the text is taken up with quotations from the works of other writers on advocacy, Indian, American and English (it is disconcerting to discover how many of them there are) and some of these are undoubtedly instructive. One finds, indeed, that what Mr. Soonavala has written himself amounts to a good deal less than half of the whole book. Even this is in my opinion too much, and in spite of Lord Birkett's commendation I find that Mr. Soonavala's writing gives me little pleasure and is, in my view, largely unreadable. Take, for instance, the following sentence from page 158: "In intricate and philosophic matters of rhythm of cross-examination can only be attained and sustained by the orthodox sequential type of cross-examination." I suppose this might be effective in a darkened room as a lullaby for a fractious child, or out in the open as a marching song for a troop of boy scouts; the one thing you cannot do with it is read it. Rather less obscure but hardly more readable is the opening sentence of § 95 (p. 222): "The most difficult type of cross-examination is the cross-examination which tends to show and to create a disbelief in the genesis of the very perception on the basis of which a fact is asserted." On the following pages Mr. Soonavala makes the points that no one can see through a brick wall and that a blind man cannot see at all. But it takes him some time to do it. "It may be generally observed," says he, "that any defect in any of the sensory organs, any deviation from the definite relation requisite to excite the sensory organs by the objects presented to them, or any obstruction in the process of their operation will occasion a failure of perception or render the perception inadequate, and similarly any circumstance deterring their occurrence or rendering their occurrence physically impossible or improbable may go to disestablish the truth of the occurrence."

Nor is Mr. Soonavala content with saying anything just once. There is more repetition between the covers of this book than I should have thought possible from one who is himself a lawyer. At the top of page 189 there is a longish quotation from *Wrottesley on the Examination of Witnesses*. At the bottom of page 190 about half of the same passage is quoted again. Similarly, on page 101 there is a quotation from Harris's *Hints on Advocacy* which is repeated on page 233; on page 241 there is a quotation from Stephen J. which is repeated (*sub nom.* Stephens) on page 247; and on page 851 there is a quotation from David Paul Brown which has already been offered, without acknowledgment, on page 76. One gets the impression that anyone who ploughed through conscientiously could turn up any number of these repetitions.

Mere repetition, however, is insufficient to account for the abnormal bulk of this book. Sheer irrelevance accounts for much more. The author makes it clear (§ 8, p. 4) that there is no department of human activity, from ballistics to belles-lettres, which the advocate can afford to neglect and there is, therefore, no limit to the range of a book about advocacy. Hence, I suppose, the paragraph on decomposed bodies which appears on page 393: "In the absence of all other evidence the presence of the uterus, which if

[1] *Canadian Bar Review*, 1954, p. 222.

unimpregnated, resists putrefaction for a considerable time, will decide the sex. In the case of mutilated remains the determination of the sex is only likely to be accurate from hairiness on the head, face, chest or pubes, development of the breasts and lineae albicantes, if any of these parts are available." Hence, too, the careful explanation of the difference between collusion and condonation which is given at pages 371–372, and the disquisition on life assurance at page 602. Once one gets accustomed to the breadth of Mr. Soonavala's interests it is no surprise to find page 425 beginning like this:

"*Table giving the number of shots in one ounce of Newcastle,* chilled or soft shot*

Sizes:	SSG	AAA	AA	A	BBB	BB	B	1	2	3	4	5	6	7	8	9	10, 12
Pellets Ounce:	11	40	48	56	64	76	88	104	122	140	172	218	270	340	450	580	850	1250"

It is when one isolates those parts of the book which (a) have anything to do with advocacy at all, and (b) appear to express the author's own views, that one begins to feel serious alarm. Unhappily, this occurs at a very early stage. It is too much to hope that those who handle this book will not get as far as page 8. Chapter 2 begins here and it is worth quoting its first two paragraphs:

"The Art of Getting Clients

"In the above chapter we saw some of the principles of conduct and behaviour which may help you towards success at the bar. Those principles may help you to win a case or a trial. But you cannot *win* a case unless you *have* a case. The day-long, the life-long struggle in your life will be not so much to *win* cases (though that is of course there) as to *get* cases.

"Is there a Formula for Getting Clients?

"Yes, there is. Do not despair, do not falter. This book ought to bring you a message of hope. The secret formula for getting clients is to remember that *every client is a human being*. Every friend, every acquaintance is a *potential* client. The more number of people you know the greater your chances of having a big clientele. You will not get clients merely by putting up your board announcing that you are a law graduate. Litigation is not hatched in lawyers' offices but in the markets of the world. So go out. Go out to the factories, go out to the railway stations, go out to the hospitals, parks, playgrounds, stadiums and all places where men gather and forgather. The more people you know, the greater is the chance of one of them coming to you for legal help. Remember, every friend is a potential client. It is up to you to see that every client becomes a friend."

If Mr. Soonavala were writing for English readers I expect he would have altered the heading of this chapter to "How to make sure of getting disbarred." Although East is east and West is west it is saddening to think that India, thirteen years after independence, can still tolerate this ethic among its lawyers. Nor does the matter rest here. The standard of honesty found in any community depends largely on the conduct and competence of its lawyers. So long as they are mercenary and verbose there will always be one law for the rich and another for the poor and the issue of a trial will depend not on who is right and who is wrong but on which party's advocate is the most tortuous and least inhibited. Or at any rate (and this is perhaps more important) it will be generally believed that the administration of justice works in this way and that so long as you have a sufficiently gifted advocate on your side, and the money to pay his fee, black can be made to appear as white and any witness can be induced to say the exact opposite of what he means or, to quote Mr. Soonavala's own words (p. 158), "when this technique is employed,

* *N.B.* I did not put in this comma. Presumably Mr. Soonavala did.

by a skilful cross-examiner, he can almost make the witness say whatever he likes, reducing the witness to a mass of clay of which the potter is the cross-examiner." This is a disastrous conception of the administration of justice, and it would be a pity if anyone took it seriously. Perhaps nobody will, because the only illustration offered by the author is one of the dialogues of Galileo on the subject of square numbers and square roots.

In his introductory note on "The Art of Advocacy" Mr. Justice Chagla very wisely remarks: "Most people think that an advocate shows his brilliance in cross-examination. That to my mind is a mistake. Sufficient attention is not given to examination-in-chief. . . ." But Mr. Soonavala does not belong to this enlightened school. He devotes pages 21 to 43 to examination-in-chief and pages 43 to 347, as well as about half the remainder of the book, to cross-examination. He begins by formulating ninety-three rules for conducting it. It is true that one or two of these rules have nothing to do with cross-examination at all (*e.g.*, rule 86, "Do not begin with your bad witnesses. Begin with your best"), but most of them are more or less germane to the subject, and Mr. Soonavala is careful to add that in any case they should not be slavishly followed. "Each rule should and must be modified according to the circumstances of each case."

Lord Birkett has called the first edition a "perfect anthology," and certainly anyone who enjoys collecting other men's flowers will find enough of them here to decorate the Albert Hall (there are more than two hundred names in the bibliography). But quite a few of the specimens fall short of perfection and I would never dare to use one of Mr. Soonavala's quotations without verifying it first. It is only natural that after telling us that every client should become a friend and every friend may become a client Mr. Soonavala should follow up with a paragraph on "How to win friends." He gives thirty-seven rules for doing this, of which the first is: "Judge not, that ye be judged." The commentary which follows the rules seems to suggest that the thought, if any, behind this dictum originated with Jesus Christ; but its expression in the words quoted is firmly attributed to Mr. Dale Carnegie whose writings, says Mr. Soonavala, "distilled the difficult principles of psychology in modern, racy prose." It is nice to know that no liability attaches to St. Matthew. Shakespeare does not come off quite so cheaply. He is cited (p. 403) as an authority for one of the fifty-four points which the author wants us to bear in mind in connection with identification parades: "It is often stated that things in motion soon catch the eye than what not stirs. (See Shakespeare's *Troilus and Cress.* A. II, S. 3.)" It is tempting to suppose that the proof-reader had collapsed from exhaustion before reaching this page, but this cannot be the case since he made a correction in this very passage. *Cf.* the first edition, where this near-miss for the views of Ulysses is attributed to Act III—which, strangely enough, is where it comes from.

But there are larger differences than this between the first and second editions, for the latter contains about forty-five pages of extra material. Some of these are mere exercises in Soonavalese—*e.g.*, the new chapter on The Music of Words. "Lawyers work only in black and white, only in chiaroscuro, only in two dimensions, only with the size and flexibility of words. Poets see and use all their qualities, playing their lights on all their facets. The lawyer is the artisan of extensive meanings. The poet is an artist in intensive meanings." Luckily this theme is only pursued for two pages. Some of Mr. Soonavala's new material is more concrete. "New techniques of advocacy," he says in his Preface, "have been forged and developed in the American courts. For example, delay by procedure was very effectively exploited by the defence advocates in the well-known Rosenberg trial. These new methods of advocacy have been referred to in a chapter newly added to this book." The chapter in question describes how the Rosenbergs were convicted of espionage and sentenced to death, their execution being fixed for May 26, 1951. It goes on to describe the fourteen subsequent appeals and

applications which were made to various courts with the object of getting the death sentence reversed. They resulted only in getting it delayed and ended with a decision of the U.S. Supreme Court on June 19, 1953. The Rosenbergs were executed the same day. This story is far from edifying and reflects no credit whatever on American methods of procedure. It is hard to see what moral Mr. Soonavala wishes us to draw from it.

Indeed, it is often difficult to discover exactly where he stands on any moral question, since he quotes almost everything which has ever been written by anybody. In the first edition, for instance, he appeared at one stage to take a definite stand (and he does so again at page 18 in the new edition) on the question of refusing briefs. "I think it most unethical for a lawyer to conduct the defence of a client when he considers him to be guilty. . . . Genuine belief in the rightness of your cause should be a condition precedent of your accepting a case." However, on the very next page he quotes Erskine and Dr. Johnson with apparent admiration for the proposition that "counsel has no right to believe or disbelieve either his client or his case," and on page 850 he reminds us that "every client has a right to be represented by an advocate" and warns us against being diffident in asking for an adequate fee. His statement about refusing briefs apparently gave rise to some controversy, and in the present edition he has added an appendix which contains another clutch of quotations on the subject. Most of them are unfavourable to the view expressed at page 18 and one is simply left to guess whether he still holds it.

So many admirable (among other) precepts are packed into this book that I cannot attribute to the author any but good intentions. Nonetheless, the book frightens me. The picture which sticks in my mind is that of the young Indian lawyer "hatching" litigation by frequenting factories and football matches, holding a series of rehearsals in his office (see p. 33), "drilling the witnesses to tell the truth in plain words" (p. 847), and finally fumbling his way through an unending cross-examination with the aid of Mr. Soonavala's ninety-three rules. Such a practitioner, however well-meaning the author may be, will bring no little discredit on the profession of the law.

That is my own opinion; but it is only just to Mr. Soonavala to bear in mind that this book has had a huge success in India. They liked it there so much that the first edition sold out at high speed, and Lord Birkett apparently liked it in Canada. All the same, I am bound to hope that no one will like it in England.

C. P. Harvey.

The United Nations. By Leland M. Goodrich. [London: Stevens & Sons, Ltd. 1960. x and 333 and (appendices and index) 84 pp. £2 2s. net.]

Professor Goodrich is best known in this country for his commentary, with Edvard Hambro, on the Charter of the U.N. He is a recognised authority on this subject and any work by him deserves serious consideration.

The value of this book is not to be found in originality nor in depth but in its clear style and its attractive, always interesting, exposition of the whole range of United Nations business. It is a first-class book for the undergraduate student or layman. For the advanced student of international relations it says little which he would not already know or be able to ascertain from other sources. Even so, the more advanced student may still be attracted by the compactness and comprehensiveness of the work.

The book deals with a variety of subjects: the establishment of the U.N.; its development, with particular reference to the changing roles of the General Assembly and the Security Council; membership; disarmament proposals; the supervision of non-independent territories; economic co-operation and many more. The treatment of each is both sound and interesting. Possibly because

of limitations of space, only cursory mention is made of the structure and work of the specialised agencies. This is a pity because a study of the agencies tends to show up the most valuable achievements of the U.N. and also provides interesting illustrations of the interaction of international politics and honest endeavour.

The publication date is misleading, since the work was first published in New York in 1959 and the text itself suggests that it was completed and revised by the end of 1958. The significance of the block admission of 1955 on U.N. voting, a subject enlarged on in the book, is now history, and one regrets that the work could not have been written eighteen months later when further admissions have again considerably changed the U.N. voting structure. When dealing with the Trusteeship Council, references are made to Togoland as being the first and only trust territory to achieve independence (as part of Ghana), on page 312. Such references emphasise how soon a work can become out of date in this rapidly developing sphere.

The book itself is very well produced and is not over-priced. The reviewer would make two small points. First, the practice of indenting quotations is often useful, but there is no real reason for using italics, so giving emphasis where it is not wanted. Secondly, like many other works in this field, appendices containing the Covenant, the Charter and the Statute of the I.C.J. are included. In all, this takes up sixty-five pages and presumably must add something to the price of the work. It would be interesting to know whether many readers attach much value to this service. The vast majority of them have almost certainly got immediate and easy access to other copies of these documents.

J. A. Andrews.

Road Traffic Offences. Third edition. By G. S. Wilkinson. [London: The Solicitors' Law Stationery Society. 1960. lix and 319 pp. £2 net.]

This is a severely practical book, almost self-consciously so. It contains continual references to relevant articles in the legal periodicals and thus acts as a very fine signpost. There are no footnotes and, therefore, it is difficult to read continuously but very few people using it would wish to do this. There are occasional inelegant sentences such as (p. 12) "*Marks* v. *Ford* (1880) is on a cab-stand as a street" but these are the exception. The absence of the complete text of the Road Traffic Act, 1960, is a disadvantage. This is particularly irritating when one comes across an odd statement like (p. 25) "see Road Traffic Act, 1960, s. 4 (5), as to aiding and abetting speeding." As the full text is not given it is a pity that in the index of statutes heavier type is not used for those page numbers which take us to the several sections which are set out verbatim.

In general the book is full of good solid material which should be of inestimable value to the practitioner. For instance there is good advice on trying charges of dangerous and careless driving together at p. 36. There are commendably detailed chapters on drunken and dangerous driving which are full of points of practice and towards the end of the book the author deals extensively with "special reasons" now, as he says (p. 253), almost entirely relevant to driving under the influence of drink. At the beginning of the book twenty-five pages are devoted to definitions, which are supported by a wealth of authority from various parts of the United Kingdom.

One admires the author's occasional frank statement, such as (p. 38) the mention as an advantage of being tried by a jury of "the recognised tendency . . . to acquit in road traffic cases" and the statement (p. 97) that in careless driving cases "legal decisions and opinions are of little help. The Highway Code is a much better guide."

To deal with one or two more contentious points there is a discussion at p. 35 of the position where separate charges against different defendants are tried together, *e.g.*, as a result of a crossroad collision. The conclusion is reached, without much authority other than civil cases, that each defendant should be allowed to cross-examine the other. Difficulties that might arise from such combined trials, particularly if there is an appeal in respect of one defendant, are somewhat glossed over. There is a statement at p. 44 that "to prove guilty knowledge, previous convictions and even acquittals can in certain circumstances be mentioned and so may cautions." The theme is not elaborated, however, and it is somewhat confused, by the inexplicable juxtaposition of an isolated statement about what is not evidence of good character, with the quite different subject of cross-examining about convictions after evidence has been given of good character.

The quotation on p. 73 of the Attorney-General, speaking on the Road Traffic Bill in 1955, when he said that "the proper authority should generally prosecute for an offence under section 1 rather than for 'motor manslaughter' save where the offence was 'near murder,' *e.g.*, a car thief running down a policeman" makes strange reading now in the light of *R.* v. *Smith*.

The author sets out, without comment, the three codes of law under which it is now possible to prosecute for obstruction of the highway (p. 143). It is to be hoped that, with the growth of motor-car traffic, both the law and the methods of its enforcement can be tidied up so that the motorist may know where he may stand.

In conclusion, whilst odd defects can be found in this book, it is one which every practitioner in the magistrates' courts would constantly turn to with profit. The author is to be complimented on his wide reading of all that has been written on this subject and his careful compilation of this text.

H. B. Sales.

Shipping Law. Fourth edition. By Lord Chorley, q.c., m.a. and O. C. Giles, ll.m. [London: Sir Isaac Pitman & Sons, Ltd. 1959. xxvi and 374 pp. (with index). 35s. net.]

This book still remains in a class of its own in that it is the only work which gives adequate coverage to all aspects of shipping law, whereas other introductory books only treat particular topics in this field, *e.g.*, marine insurance, the carriage of goods by sea. One of its principal characteristics is that throughout its pages due attention is given to the historical development of the subject, for unless this treatment is adopted, a proper understanding of this branch of the law can never really be acquired.

The text is clear and the style is very readable, and this is especially so in view of the full use of heads and sub-heads that has been made in the layout of the material to be considered. All the alterations in the law since the last edition have been carefully noted, and in particular the fundamental change as to the right of a shipowner to limit his liability brought about by the Merchant Shipping (Liability of Shipowners and Others) Act, 1958, has been skilfully incorporated.

In the Appendices perhaps a better idea of a bill of lading would be conveyed if a facsimile of an actual bill were included. Further, it might be preferable to include as a specimen of a charterparty one of the standard forms, *e.g.*, the "Centrocon," issued by the Documentary Committee of the Chamber of the United Kingdom. In an introductory book it is difficult to know whether the texts of the relevant statutes should be set out in an appendix. Possibly, if space permits, the Marine Insurance Act, 1906, could be inserted in the next edition as this would aid the student reading the chapter on marine insurance.

E. R. H.-I.

THE PRINCIPLES OF AGENCY. Second edition. By H. G. HANBURY. [London: Stevens & Sons, Ltd. 1960. xix and 235 pp. 35s. net.]

THE substance of the text of this new edition of Professor Hanbury's work is that of the first edition, the number and titles of the chapters being the same, but in addition to the basic editorial work of giving recent decisions and statutes their due place, there has been a certain amount of rewriting and rearrangement. This is seen, for instance, in the treatment of agency of necessity and of the relationship of trust and agency. The new edition runs to almost the same number of pages as the old but exact comparison is not possible since the layout and general appearance of the printed text has been much improved by the device of stating the facts of cases in smaller type.

It must be remembered, as previous reviewers have stressed, that this book is a reprint of a course of lectures and that the author has, therefore, been guided by principles of selection and emphasis which might not be in place in a work intended as a formal and comprehensive textbook. Thus, Professor Hanbury discusses bankruptcy and death in relation to agency without mentioning the Bankruptcy Act, 1914, or the Law of Property Act, 1925, ss. 124, 126 and 127, but, on the other hand, he explores a number of strange by-ways, untrodden by more orthodox writers.

As the book is certain to run to further editions it may be appropriate to call attention to a number of misprints and minor infelicities, some misleading and some merely vexatious. Thus at p. 10 the Crossed Cheques Act, 1906, and section 82 of the Bills of Exchange Act, 1882, are spoken of as still in force. They have, of course, been repealed and replaced by the Cheques Act, 1957. The form "Parke J.," at p. 62, ignores that learned judge's transfer to the Court of Exchequer in 1834. Furthermore, the account of *Bryant* v. *Flight* at that page does not make it sufficiently clear that the agent recovered a reasonable remuneration. A trio of errors appears at p. 76. In the statement of the facts of *Levy* v. *Barnard* the substitution of £210,000 for £21,000 may mislead the unwary. In footnote 39 it is said that *Brandao* v. *Barnett* dealt with a *baker's* lien, and an incorrect report reference is given for *Near East Relief* v. *King*. *Watson* v. *King* cited at p. 85 for the proposition that an authority coupled with an interest is terminated by death is contradicted or qualified by a number of equity authorities including *Carter* v. *White* (1883) 25 Ch.D. 666, *Spooner* v. *Sandilands* (1842) 1 Y. & Coll.C.C. 390 and *Kiddill* v. *Farnell* (1857) 3 Sm. & G. 428. The statement at p. 185 that a joint tortfeasor cannot claim an indemnity in respect of an act which amounts to a criminal offence "at any rate if it involves *mens rea*" might well carry a reference to the Law Reform (Married Woman and Tortfeasors) Act, 1935, s. 6 (1), which seems in terms wide enough to allow such recovery. The consistent misspelling of *Navarro* v. *Moregrand* has resulted in its appearing on the wrong page in the table of cases, and the misplacing of the text of a footnote on p. 130 would lead the incautious reader to suppose that Lord Bowen still graced the Bench in 1939.

Three final small suggestions are that a reference to the controversy in the *Law Quarterly Review* between Professor Gower and Mr. Slade might be added to the discussion of *Warlow* v. *Harrison* at pp. 26–27, a fuller treatment of the distinction between service and agency than that given at pp. 10–11 would usefully complement the new treatment of the trustee-agent distinction and a reference to *Gibbons* v. *Westminster Bank* [1939] 2 K.B. 882 might be added to the footnote on p. 48 dealing with the liability of a banker for the wrongful dishonour of a cheque. The cases at present given do not cover the position of a non-trading plaintiff.

The great dangers of a work originating as a course of lectures seem to be the small inaccuracy and the unguarded generalisation. The ordinary processes of re-editing should eliminate the one and the cautionary footnote the other.

The merits of this book will assure its position in the literature of its subject when these treatments have done their work.

A. H. Hudson.

Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice. Eighteenth edition. By Basil Antony Harwood. [London: Stevens & Sons, Ltd. 1960. xxix and 409 and (appendices) 107 and (index) 22 pp. £2 15s. net.]

Odgers on Pleading and Practice has become the firmly established manual of procedure both as the introduction to the working of litigation for the student and as a refresher of memory to the practitioner, serving as a lamp to light the highways and byways of the *White Book*. It first appeared in 1891 when its author, the late Dr. W. Blake Odgers, and by the time of its second edition, 1894, one of Her Majesty's Counsel, gave to the legal world this much-needed textbook, perhaps the first textbook in this sphere of the law which could claim to be literature and not merely a narration of legal rules and factual matter. For the student its seeming weakness might be regarded as derived from its outstanding merits, for it was so readable as not to be capable of facile use as a "cram book" for examination purposes, and in this respect it shared the characteristics of *Dicey on the Law of the Constitution* and the works of *Pollock on Contracts* and *Torts*, and some textbooks of later date. Subsequent editions have worthily maintained its readableness and attractive mode of presentation, as observed in respect of previous editions. Changes in the methods of practice, which have been relatively frequent in recent years, have demanded new editions, if those they replaced were not by the very nature of things to mislead those who relied thereon. These changes, however, have in no way deflected from the easy flow of the exposition and the charm of manner with which this presentation of what to many might seem a somewhat forbidding subject made quite the contrary.

In the current edition certain new features may be noted. Description of procedure rules has been brought up to date, at least as far as possible in relation to the date of publication, and thus the terminal point has been May 1960. Chapters 4 and 26 are those which recent developments in adjective law have necessitated changes in narrative and exposition, notably procedure in regard to assessment of damages and references and appeals therefrom, and to procedure for setting down and listing actions for trial. The Supreme Court Costs Rules, 1959, have caused necessary amendments to the last-named chapter and elsewhere. The cases of *A. Martin French* v. *Kingswood Hill, Ltd.* [1961] 1 Q.B. 96 and *Speidel* v. *Plato Films, Ltd.* [1960] 3 W.L.R. 391; [1960] 2 All E.R. 521 were decided too late for inclusion in the text and the editors rightly observe that pp. 99 and 100 of the text must be reconsidered in their light.

Some constructive criticism of the previous edition and a corrigendum have been noted, and one is glad to see that an extension of Chancery precedents suggested in these columns in the review of its predecessor has been partially adopted by the inclusion of a precedent of a petition where an amusing entitlement of the parties shows how an invidious selection of names can be avoided. A precedent of an affidavit in support of an originating summons, as also of a motion, would be welcome.

One hopes that it will not be regarded as ungracious to find a bone to pick with an item which, as far as I have been able to check, never appeared under the editorship of the author. Surely the time has come to alter the names of the parties in General Indorsement No. 7 which reappears in the current edition on p. 445. This is a claim for money lent by an assignee of a money-lender who is denominated "Israel MacPherson." This back-handed compliment to presumably a Scottish member of the Jewish community does not strike

one as either funny or clever. It only required the need to give an address to find it stated as Aberdeen to complete the inept citation. John Doe and Richard Roe may no longer figure in contemporary reports, but they might well have been revived to take the place of the Judaeo-Caledonian nomenclature above adopted. The legal profession is itself from time to time the subject of discriminatory innuendos that its members do well not to follow an unpleasant example. The late Dr. Blake Odgers, whom your reviewer personally knew and gratefully remembers, denominationally belonged to a minority group and was the very quintessence of tolerance generally, but he had no tolerance for intolerance. It would be a service to his memory to omit so inept a citation and thus redound to the dignity of an outstanding classic in the sphere of legal textbooks.

The book is admirably produced and bound in a lighter shade than usual—like the *White Book* much use will darken its hue.

Bertram B. Benas.

The Conflict of Laws. Fourth edition. By R. H. Graveson, ll.d., s.j.d., Professor of Law in the University of London. [London: Sweet & Maxwell, Ltd. 1960. xliv and 587 pp. (with index). 45s. net.]

This work was originally designed as a students' treatise. In the twelve years that have passed since its first publication its size has increased with each of its four new editions. It is now, in fact, approaching the bulk which some years ago might have been associated with an ordinary textbook. It is to be hoped that this fact will not deter anyone of those for whom it was, and still is, primarily intended from perusing it. During these twelve years the conflict of laws has, in consequence of economic developments within and without Europe, gained enormously in importance. It has a far greater claim to the attention of the practitioner and consequently of the law teacher and his pupils than it had a comparatively short time ago. This book still has the great merit of being far easier to read than any of the other textbooks in its field. Its comparatively large size is in part explained by the fact that it treats a number of topics which are not to be found in other books. To write simply, as he intended to, the learned author had to say a few more words here and there than would have been required, had he been writing for experts. But that it is not to say that this is one of those books which a student may consign to the dustbin, when he has graduated. On the contrary: it is now very safe to predict that he will find it a most useful first aid in many, if not in most, of the difficulties which he may encounter in ordinary practice and a safe guide to the larger works in nearly all of them.

Naturally, the author's first task was to lead his readers through the available material and not to overburden them with either criticism of established lines of cases or novel suggestions. But the attentive reader looking out for these will not be disappointed, even though the criticism might be expressed in one word only, as, *e.g.*, p. 217, where the English law relating to the acceptance of offers is rightly described as "unfortunate," or the suggestion be contained in a few sentences as on p. 95, where the splitting up of the world into its two parts, the democratic and dictatorial, is described as affecting the answer to the question whether a person whose domicile of origin is on this side of the iron curtain intended to establish a permanent residence on the other side. Throughout the book the author imparts his instruction in a most attractive manner. Only the dullest type of student can fail to be interested, *e.g.*, in the colourful explanation of the doctrine of the "proper law." The footnotes which are appended to the chapters on classification, the connecting factors and the *renvoi*, warning readers of the difficulty of these topics, are rendered unnecessary by the author's most lucid exposition.

One of the most remarkable features of the book is the attention paid to the movement in favour of a reform of the traditional concepts. Full justice is done to the efforts of the Private International Law Committee and the Conference on Private International Law at The Hague. This is entirely praiseworthy: that these endeavours have not had the full success which they deserve is largely due to the fact that the profession at large is not sufficiently aware of their necessity. A student brought up on this book will thus at the same time obtain full and correct knowledge of the *lex lata*, and also gain a sound appreciation of a good many of the requirements of the *lex ferenda*.

The very excellence of the work renders it necessary for the reviewer to list some desiderata for the future editions which can confidently be expected. Although one hesitates to suggest the inclusion of further material in a book whose size has swollen with every edition, there are some topics which are of such importance in present-day legal practice that a few paragraphs might with great advantage be devoted to them: the doctrine of the waiver of immunities, the conflict of laws in the field of copyright, patents and trade-marks and a short bibliography of foreign works on the conflict of laws might be included; the law on service and evidence abroad, which has recently been admirably summarised by Master Harwood and Lord Dunboyne in 10 I.C.L.Q. 284, might receive fuller treatment. The present reviewer also feels strongly that the general arrangement of the book deviates too far, and for insufficient reasons, from the accepted pattern. The first part, headed "Primary Concepts" includes the law of family relations with the sole exception of the law relating to marriage settlements, but not the doctrine of public policy or the treatment of foreign penal and revenue laws. The second part headed "Validity of Legal Acts" deals, of course, not only with the question whether foreign Acts are or are not valid, but also with their effect. The last part headed "Jurisdiction" comprises the entire law of conflict in the field of civil procedure, the choice of law in the field of intestate succession and torts and some topics which, it is submitted, clearly belong to the first and "general" part. A student-reader perhaps does not mind in which order his intellectual fare is served up to him. But textbooks on private international law are widely read not only in the country in which they were written and published, but by lawyers all over the world. Any deviation from the traditional order of topics increases the difficulty of understanding which foreign users have to meet and is therefore to be deprecated, unless justified by very important reasons. This work being particularly suitable for the use of foreign readers as a first introduction to the English system of private international law, would gain further in usefulness by following more strictly the accepted pattern of arrangement.

E. J. COHN.

EMPIRE INTO COMMONWEALTH. By THE RT. HON. EARL ATTLEE, K.G., P.C., O.M., C.H. [London: Oxford University Press. 1961. 54 pp. 7s. 6d. net.]

THIS little book contains the four Chichele Lectures delivered by Lord Attlee at Oxford in May 1960 on the subject of "Changes in the Conception and Structure of the British Empire during the Last Half Century." For one who was privileged to hear the lectures when they were first delivered it is a pleasure to possess a copy of them, and a privilege to be able to review them. Lord Attlee stresses that they result from reflection rather than research, and that they give an essentially personal impression. The first lecture describes the Empire "at its apogee," that is, at the time of Queen Victoria's Diamond Jubilee in 1897. The remaining lectures discuss the changes which took place in the parts of the Empire wholly or mainly inhabited by persons of European stock (Lecture 2), the changes in Asia (Lecture 3), and the changes in Africa

(Lecture 4). Lord Attlee has lived throughout the period he is concerned with, first as an ordinary citizen, later as an M.P. and a Minister, and now in what might be described as semi-retirement.

As always the author writes clearly and simply (a great virtue in any writer), and with a dry humour. But on rereading these lectures one may, perhaps, be a little disappointed. Is this book not rather lightweight material? With only fifty-four small pages there are, on average, thirteen and a half to each lecture, and though what is said is attractively written there is precious little that we did not know before. Some points are well made, for Lord Attlee stresses that the British Empire is the only empire which, without external pressure or weariness at the burden of ruling, has voluntarily surrendered its hegemony over subject peoples and has given them their freedom; he asserts that the South African War and the Russo–Japanese War (won by a non-European state against a titularly European country) were the marks of the beginning of the great changes to come; and he is optimistic about the future value of the unique institution of the Commonwealth. But so much else is skimped. The author dwells lovingly on the development of India, but he dismisses Pakistan in a few lines. Was this not the very mistake which the author's Government made at the time of granting independence to those two countries? Similar very superficial treatment is accorded to Burma, Ceylon, Malaya, Cyprus, Malta and, in Lecture 4, the whole of Africa, other than South Africa. The reason, so far as Africa and some of the other countries are concerned, is doubtless that the developments have nearly all occurred since Lord Attlee last held office as Prime Minister in 1951. But the title of the book suggests a broad survey. Are we not entitled to expect something more from an ex-Prime Minister who held office at such a crucial formative period? Lord Attlee really only deals with the developments in three or four countries. Perhaps the trouble is that the author deliberately eschewed research and relied on his memory. Because of this the claim on the dustjacket that the book is an "important document" can hardly be sustained. As it stands the volume amounts to a collection of general knowledge, though general knowledge set out objectively and fairly. This characteristically balanced approach, together with the fact that the volume contains reminiscences of a Prime Minister, makes it a book worth having.

D. C. M. Yardley.

The Common Law in India. By M. C. Setalvad. The Hamlyn Lectures Series. [London: Stevens & Sons, Ltd. 1960. 227 pp. £1 1s. net.]

The Attorney-General of India is the latest of a distinguished line of Hamlyn Trust lecturers. He is also the first of those lecturers not to come from some part of the United Kingdom. It is perhaps very fitting that the first Hamlyn Trust lectures to be given by someone from outside the world of academic and practical law in the United Kingdom should come from an Indian, and should be concerned with the Indian legal system. For the history and development of the common law in India have been largely neglected by English lawyers. Some notable exceptions may be mentioned: Maine, Pollock and Stephen were all interested in, and indirectly connected with, law in India, either as administrators or draftsmen. But the average English lawyer, whether academic or practitioner, in respect of Indian law may be included among those "Common People" for whose instruction and benefit the Hamlyn Trust was inaugurated.

The theme of this book is the way in which English law came to India and what happened to it during the continuance of English political power. But it is not a work of legal history, discussing what has long since gone (although it begins with an historical chapter). As the learned author says, "though

the political ties have altered, the Indian legal system based on English law still endures." It is a system the fabric of which, notwithstanding its foreign roots and origins, is unmistakably Indian in its outlook and operation. Nonetheless, to judge from the contents of this book, it is also a system that resembles greatly the common law in its old home, differing from it mainly in being improved in many particulars.

These resemblances and improvements are very well brought out by the author, especially in the two central chapters on civil and criminal law, which are discussed in some detail after the author has explained how English law was introduced into India, how statutes affected it, and how it has been interpreted and applied. The chapter on civil law deals with succession, contract, property and torts, comparing the Indian law, in particular the Indian law of contract, with English law. That comparison brings to light much that is interesting, notably in relation to such matters as consideration, illegality, and mistake in the law of contract. In the chapter on criminal law the provisions of the Indian Penal Code are contrasted in some detail with the rules of the common law, bringing out the superiority and successful drafting of the former. The final chapter is concerned with the constitution of the new Dominion of India. Here the author explains how the various powers of government are distributed and the different controls laid down in the Constitution in respect of the exercise of the executive and legislative functions of government. Two matters of especial importance and interest arise for consideration in this respect. One is the contrast between the functions of the courts in England and India. English courts have little control over the exercise of executive and legislative powers by the appropriate bodies or persons: Indian courts enjoy very wide powers, most especially as regards administrative tribunals. The other is the Bill of Rights which is contained in the Constitution. The contents of the relevant clauses of the Constitution are examined by the learned author and contrasted with the similar provisions of the United States Constitution and the common law rules relating to the rights in question.

This is intended to be, and is a comparative study, not just an outline of Indian law. As such it is an extremely useful addition to the growing library of books in the English language on comparative law. Throughout there are references to relevant literature and to the Indian law reports; but the book is not overburdened with such references, so as to interrupt the smooth flow of its exposition. Here and there occurs a misprint, and at one point, where the learned author is discussing what amounts to provocation in English law, a mistake. But these *minima* do not detract from the excellence and value of the book.

G. H. L. FRIDMAN.

SHORTER CONSTITUTION OF INDIA. Third edition. By DURGA DAS BASU. [Calcutta: S. C. Sarkar & Sons (Private), Ltd. 1960. 767 pp. Rs. 23. 33s.]

INTRODUCTION TO THE CONSTITUTION OF INDIA. By DURGA DAS BASU. [Calcutta: S. C. Sarkar & Sons (Private), Ltd. 1960. 362 pp. Rs. 10. 20s.]

THE Indian practitioner and the more advanced student of the long and detailed Constitution of India have two encyclopedic commentaries in the five volumes of *Commentaries on the Constitution of India* by V. V. Chitaley and S. Appu Rao and the two volumes of Dr. D. D. Basu's *Commentary on the Constitution of India*. Both are quarries of comparative constitutional law.

The latter, now in its third edition, is probably the more widely used in this country. Not content with compiling also two collections of *Cases on the Constitution of India*, Dr. Basu has more recently published a *Shorter Constitution of India*, the third edition of which we have now received. It not only abridges the law contained in the *Commentary* but also supplements it by bringing the case law and statute law up to date. Special emphasis is placed on the fundamental rights and constitutional remedies. The *Shorter Constitution* is intended to be a book of reference for busy practitioners, but we can recommend it also to students who want a handy work of reference that is comprehensive, concise and accurate.

The indefatigable Dr. Basu has also written an *Introduction to the Constitution of India*, intended for the general reader or the student beginning his study of the Indian Constitution. For this purpose he begins with chapters outlining the constitutional history of India from the Government of India Act, 1858, to the grant of independence and the drafting of the independent Constitution; and then discusses the philosophy underlying the Constitution, with special reference to fundamental rights and the directive principles of State policy. The purpose of the remainder of the book is not to provide an analysis of each article, but to explain the political background of the various provisions and to describe the actual working of the Constitution during its first ten years. Dr. Basu, taking issue with Sir Ivor Jennings over the provision for the protection of minorities, allows emotion to mix his metaphors; but his firm belief in the virtues of the Indian Constitution and his faith in the efficacy of its working are not allowed to detract from his high standards of legal scholarship.

O. Hood Phillips.

Conflict of Interest and Federal Service. By The Association of the Bar of the City of New York Special Committee on the Federal Conflict of Interest Laws. [Harvard University Press; London: Oxford University Press. xvi and 330 pp. 44s. net.]

This is a model piece of research on the economic conflicts which confront those employed in Federal Government service in the U.S.A. Must they divest themselves of investments in companies engaged in government contracts, including shares in family businesses? When may they accept gifts? What rules govern allocation of government contracts? How far may they use for personal gain information acquired in their official capacity? What restrictions on post-service civilian employment are insisted on?

The book surveys the existing statutes and regulations and the significance of Congressional inquiries. It examines the impact of all those problems on recruitment and assesses the adequacy and utility of existing law. It ends with a draft of a proposed statute, every section of which is justified in detail.

Of course these problems are much greater in the U.S.A. than in Britain because of the much more frequent interchange between private and public careers in the U.S.A. Britain has its *Estacode* (not available to the public), its Command Papers on the *Bullock* case, of the Lynskey Tribunal, the Herbert Report, the Woods Report and the Bank Rate Report, and its inquiries into currency speculation by Foreign Office officials. Yet no systematic account of the present civil service practice relating to shareholding, contract allocations, post-service employment, gifts and family relationships, let alone an evaluation of it, has ever been written. The Association of the Bar of the City of New York are to be congratulated on producing this well-written book; perhaps someone may thereby be encouraged to fill in a gap in the literature of English public law

Harry Street.

Pension Schemes and Retirement Benefits. Second edition (with Supplement). By Gordon A. Hosking, Fellow of the Institute of Actuaries, Fellow of the Royal Statistical Society, Associate of the Institute of Taxation. [London: Sweet & Maxwell, Ltd. 1960. xv and 466 pp. (with index). £2 10s. net.]

The organisation of pension schemes and retirement benefit schemes has nowadays become a matter for specialists. Although lawyers are necessarily engaged in the preparation of such schemes, they are unqualified by their training and by experience to deal with many of the problems which arise. The actuary, the stockbroker, and the insurance company all have major functions to fulfil; as well as the lawyer and the accountant. Mr. Hosking's book, already in its second edition and well established as a leading work on pension schemes, is not written as a legal textbook: it does not, for example, refer in any detail to the problems of trust law which arise in connection with the settlement of funds on employees and their dependants, nor are estate duty considerations dealt with at any length. Nor, even, is there any table of statutes or cases. This is not to imply any criticism of the book: Mr. Hosking is not a lawyer but has qualifications and experience which enable him to write about pension schemes as they work in practice.

The tax problems to which pension schemes and retirement benefits give rise are many and complex: Are employer's contributions deductible in computing profits? Are they to be treated as additional emoluments of the employee and assessed on him? Are the employee's contributions deductible? Are pensions taxable, and can lump-sum payments be withdrawn free of tax? The answer to many of these problems depends on the form of approval given by the Commissioners under various provisions of the Income Tax Act, 1952, and these provisions are clearly stated and considered in the text.

For the reader in search of a technical study of the problems of providing pensions for individuals and groups, and which deals with the financial and the actuarial as well as the legal problems, *Hosking* is to be recommended. The usefulness of the book is increased by the Appendices, which set out the text of the relevant legislation (including the National Insurance Act, 1959), and by a supplement which incorporates the statutory instruments published under that Act up to August 1, 1960.

B. Pinson.

The Jubilee Lectures of the Faculty of Law, University of Sheffield. Edited by O. R. Marshall, M.A., PH.D. [London: Stevens & Sons, Ltd. 1960. xv and 144 pp. 25s. net.]

The Faculty of Law of the University of Sheffield decided to celebrate its fiftieth year by inviting five teachers of law from other universities to address the Faculty. Professor Hamson came to plead for the use of the comparative method in the teaching of law as a modern liberal education. Professor Hanbury investigated the crime of forgery and its effects in civil law. Professor Keeton surveyed the field of equity and Professor Graveson the law of domicile and, finally, Professor Hart analysed the requirement of voluntary conduct as an essential of criminal liability. Every one of these lectures contributed fittingly to the occasion which, though it did not call for original advance of learning, demanded a display of the manner and content of contemporary academic teaching of English law.

In some ways the most interesting part of this book is the Preface in which Professor Marshall has traced the history of the Faculty of Law at Sheffield of which he is the present Dean. Although able to conclude on an optimistic note Professor Marshall shows that this Faculty had to struggle hard for

survival. This struggle may have been longer and harder there than elsewhere, local conditions and personal factors may have played their parts, but the position at Sheffield is sufficiently similar to that at other provincial universities to consider it of general significance: law teaching is undertaken in the first instance for the benefit of articled clerks, curricula, selection of staff and even timetables are adjusted to meet the wishes of a profession which remains largely sceptical of the value of academic training for law and unwilling to make it compulsory. As long as the number of students remains far smaller than in other faculties the universities cannot afford sufficient staff and facilities for research, and law faculties continue to function more or less precariously until rescued by the present policy of university expansion. Yet in order to claim their share of the benefits of this policy law faculties will have to achieve a new balance between the different needs of vocational instruction and teaching law as part of a higher education for which a growing demand has developed.

This balance will have to be achieved before the present force of expansion, which cannot be expected to last indefinitely, has spent itself. The Faculty of Law at Sheffield, remembering its early struggles, may be expected to face this task with the sense of urgency which it demands.

J. Unger.

Gute Sitten und Ordre Public. By Konstantin Simitis. [Marburg: N. G. Elwert Verlag. 1960. xix and 236 pp. DM.24.]

The German civil code invalidates contracts which are contrary to *boni mores*. It makes no provision for declaring void contracts offending against public policy, although a draft of the civil code contained such a provision. This omission caused considerable inconvenience, for it took some time until the courts extended the scope of the *boni mores* section to include public policy. As a result the case law on the section has experienced an extraordinary growth, the result of which is even more bewildering than that experienced in English law, for instance, in connection with the old section 4, Statute of Frauds—for, as opposed to that Statute, the *boni mores* provision impinges on the entire law of contract and beyond, for instance, to the law of wills, where testamentary dispositions have been declared void as contrary to public policy.

With great industry and acumen the author describes the case law relating to the *boni mores* section of the German civil code and the equally abundant views of scholars, most of which the courts have apparently disregarded. He reviews foreign laws, notably those of France and England, which expressly provide for contracts to be declared void as contrary to public policy, and ends with a plea for the inclusion of such a clause in the German civil code. This plea loses a great deal of force by the author's conclusion that the categories of contracts declared void in France and England under the *ordre public* and public policy rules, respectively, are very similar to the categories developed by the German courts under the *boni mores* rule, but the author maintains that such a reform of the German law would at any rate remove sterile arguments about morality.

The author's very great scholarly effort is unlikely to move the legislature in Germany. It has, however, by implication demonstrated that a tidy code can produce a very untidy case law and, coupled with the missing restraint inherent in a system of precedents, a degree of uncertainty of the law that probably far exceeds that of the English common law.

O. C. Giles.

The Development of Australian Trade Union Law. By J. H. Portus, reviewed at p. 305, is published in England by the Cambridge University Press.

CORRESPONDENCE

THE EDITOR,

The Modern Law Review.

Sir,

Since writing my note on the Eichmann Case, which appeared in the September 1960 issue of the *Modern Law Review*,[1] certain facts have come to my attention which require corrections to be made to that article.

At page 508, note 7, and page 510, note 16, I referred to the decision of an Argentine court rejecting an application from Czechoslovakia for the extradition of one Durcansky. On the basis of the report in *The Times* of July 22, 1960, I stated that this request was rejected because of the absence of an Extradition Treaty between the two countries. I have since seen a copy of the actual judgment. From this it is clear that, although the lack of a treaty was put forward by the defence as one of the grounds for Durcansky's non-extradition, the court rejected the application on the grounds of extinctive prescription in accordance with Article 62 of the Penal Code.

I had also relied on *The Times*, May 28, 1960, for the statement at the bottom of page 509, that Mr. Ben-Gurion "claimed personal credit for the operation." *The Times* report purported to be a translation of an extract appearing in a letter from the Prime Minister printed in the Israeli newspaper *Davar*. In fact, the translation of the relevant portion of Mr. Ben-Gurion's letter reads as follows: "I see the importance of Eichmann's capture and his trial in Israel not in the impressive and skilfully executed operation of the Security Services (although it is difficult to exaggerate the praise due to the members of those Services), but in that, as a result of that operation, the whole story of the annihilation of European Jewry will be unfolded, and rightly so, in an Israeli court." From this it is clear that the actual statement made by Mr. Ben-Gurion was very different from that which appeared in *The Times* and which was the basis of my statement.

At page 511 I have stated that Eichmann's crimes had a definite location, being primarily committed at Auschwitz. In fact, of course, the "final solution" with which he was associated was not so geographically confined, as is clear from the proceedings of the Nuremberg Tribunal itself.

Finally, there is a small misprint in the last sentence of the article. This should have been written in the past tense. What happened here was that the announcement concerning the settlement of the issue between Argentina and Israel was made while the piece was already in proof. Due to an oversight, I failed to make the necessary amendment.

I should appreciate it if you could print this *Corrigendum* in an early issue of the M.L.R.

L. C. GREEN.

Faculty of Law,
University of Malaya
in Singapore.

[1] 23 M.L.R. 507.

THE EDITOR,

The Modern Law Review.

Sir,

May I be permitted two brief comments on Professor Sawer's interesting letter in the March number of the *Modern Law Review*,[1] in which he discusses my note of May 1959 [2] on *Re Sebba* [3]?

It is true that the text of the relevant Canadian and Ontario statutes might have been proved by the machinery of the Evidence (Colonial Statutes) Act, 1907, but in my note I was concerned with what in fact happened in the case and not with what might have happened. Danckwerts J. may well have arrived at a correct result. It may even be that he was justified in taking the course he did for some unstated reason, for example, the acquiescence of the parties; but the important question is whether the method which he said he was adopting was a proper one in the light of the course of the trial as reported. No mention is made in the report of the 1907 Act nor is it clear that its requirements were in fact complied with. There is no evidence at all that the text of the Dominion statute was before the court and though we are told [4] that the text of the Ontario statute was provided by counsel we are not told that it was a copy "purporting to be printed by the Government printer." [5]

A more doubtful point is whether the Act of 1907 entitles the court to dispense with expert evidence. On its face the Act merely relates to the way in which the text of a colonial statute is to be proved and it might well be argued that expert evidence would still be needed to inform the court whether the statute was still in force and how it should be construed.

This was the view taken by Hill J. in *Brown* v. *Brown* [6] though in a number of other cases it was assumed without argument that proof of the statute was proof of the law,[7] a view which has academic support.[8] Logically however there seems much to be said for Hill J.'s view and it cannot be dismissed without discussion.

M. P. FURMSTON.

Faculty of Law,
The University,
Birmingham.

[1] 24 M.L.R. 312.
[2] 22 M.L.R. 317.
[3] [1959] Ch. 166.
[4] [1959] Ch. 166 at 174.
[5] Evidence (Colonial Statutes) Act, 1907, s. 1 (1).
[6] (1917) 116 L.T. 702.
[7] See, e.g., *Waterfield* v. *Waterfield* (1929) 73 S.J. 300; *Roe* v. *Roe* (1917) 115 L.T. 792; *Gibson* v. *Gibson* (1920) 37 T.L.R. 124; *Taylor* v. *Taylor* [1923] W.N. 65.
[8] Dicey, p. 1114, note 80; Graveson, p. 399. Cheshire does not appear to discuss the point.